(18,520.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 319.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, AND WILLIAM H. SUMNER, PLAINTIFFS IN ERROR,

vs.

JAMES GADSDEN, GEORGE THRUSH, MATTIE THRUSH, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 In the Supreme Court of the State of Nebraska.

GADSDEN
v.
THRUSH. } No. 12533.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 7th day of January, A. D. 1902.

Present: Hon. T. L. Norval, chief justice, Hon. J. J. Sullivan, judge, Hon. Silas A. Holcomb, judge.
Attest: LEE HERDMAN, *Clerk*.

Be it remembered that on the 22nd day of January, 1902, there was filed in the office of the clerk of said court a certain transcript in words and figures following, to-wit:

JAMES GADSDEN
vs.
GEORGE THRUSH, CHARLES THRUSH, SR., MATTIE N. THRUSH, Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased; J. C. Noyes, William H. Sumner, and The Nebraska State Bank of Schuyler, Nebraska; The First National Bank of Schuyler, and The Schuyler National Bank of Schuyler, Nebraska.

Pleas before the district court of the sixth judicial district of Nebraska in and for the county of Dodge, at a term thereof holden in the city of Fremont, in said county and State, on the 4th day of January, one thousand nine hundred and two.

2 Present: Honorable Conrad Hollenbeck. J. M. Cruickshank, clerk.

Be it remembered, that heretofore, to-wit, on the 13th day of August, 1901, a mandate was filed in the office of the clerk of said court in the words and figures following, to-wit:

Mandate.

In the Supreme Court of the State of Nebraska, Sitting at Lincoln, January Term, 1899.

To the district court of the sixth judicial district, sitting in and for the county of Dodge, Greeting:

Whereas in a late action before you wherein James Gadsden was plaintiff and George Thrush, Charles Thrush, Sr., Mattie N. Thrush, Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased, Wm. H. Sumner, The Nebraska State Bank, of Schuyler, Nebraska, J. C. Noyes, The First National Bank, of

Schuyler, Nebraska, and The Schuyler National Bank, of Schuyler, Nebraska, were defendants, you rendered a judgment in said cause, upon a transcript of which record and proceedings in your said court, the said plaintiff, James Gadsden and the said defendants, George Thrush and Mattie N. Thrush, prosecuted appeals to the supreme court of the State of Nebraska, seeking the reversal of your said judgment against them in favor of the defendants, The First National Bank, of Schuyler, Nebraska, Wm. H. Sumner and The Schuyler National Bank, of Schuyler, Nebraska, upon a trial of which cause in said supreme court, during the September term, 1898, it was considered by said court that the judgment rendered by you in said cause be reversed at the costs of said defendants, taxes at $66.90 and cause remanded to you with directions to ascertain the amount of money advanced to Thrush by
3 the Schuyler national bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any; to postpone the lien of the First national bank to that of the plaintiff, and for such further proceedings as may be necessary and not inconsistent with the opinion of said court filed in said cause on November 3, 1898 and reported in the official reports of said court, Nebraska Reports, at page 565 of volume 56 thereof; and, afterwards, a rehearing in said cause was allowed to the defendant, The Schuyler National Bank, upon a further trial of which cause, in said supreme court, during the January term, 1899, it was considered by said court that the judgment of said court in said cause during the September term, 1898, hereinbefore recited, be adhered to; and, afterwards, upon a writ of error sued out by the Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, said cause was appealed to the Supreme Court of the United States, wherein, during the October, 1900, term thereof, said writ of error was dismissed for the want of jurisdiction and said cause remanded to the said supreme court of Nebraska for further proceedings in conformity with the said judgment of said supreme court of Nebraska.

Now, therefore, you are commanded, without delay to proceed to carry into effect the said judgment of our said supreme court in the manner provided by law.

Witness the Hon. T. L. Norval, chief justice, and the seal of said court, at Lincoln, this 10th day of August, 1901.

[SEAL.] LEE HERDMAN, *Clerk*,
By E. W. NELSON, *Deputy*.

Costs in supreme court $66.90.
$19.60 due clerk.
$45.80 due appellants.
$1.50 due sheriff.

On the 4th day of January, 1902, there was entered on record in the office of said clerk a certain journal entry in the words
4 and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff,

vs.

GEORGE THRUSH, CHARLES THRUSH, SR., MATTIE N. THRUSH, Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased; J. C. Noyes, William H. Sumner, and The Nebraska State Bank of Schuyler, Nebraska; The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, Defendants.

Now on this 4th day of January, 1902, this cause came on to be heard upon the mandate and order of the supreme court of the State of Nebraska, and in obedience to and conformity with said mandate and order: It is by this court ordered, adjudged and decreed that the decree of this court herein rendered and entered on the 31st day of August, 1895, be and the same is hereby modified and reformed, so as to read and be as follows, viz:

Now, on this 31st day of August, 1895, this cause came on to be heard and tried to the court upon the cross petition of the defendant First National Bank of Schuyler, Nebraska, filed by leave of court; upon the answer and cross petition of the defendant State Bank of Schuyler, Nebraska, and the answer thereto of the defendants George Thrush and Mattie N. Thrush, and the reply to said answer; upon the answer and cross petition of William H. Sumner and the amendment thereto, by leave of court, of the answer and cross petition of the defendant The Schuyler National Bank which was incorporated therewith, and the answer of defendants George Thrush and Mattie N. Thrush thereto, upon the answer and cross petition of Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased, and the answers of George Thrush and Mattie N. Thrush thereto; upon the answer of the plaintiff to the cross petition of the defendant First National Bank of Schuyler, Nebraska, and upon the reply and several pleadings to the aforesaid answers and cross petitions and upon the evidence, and was submitted thereon to the court; on consideration of which the court, being duly advised in the premises, does find:

1st. That the said defendants, George Thrush and Mattie N. Thrush executed and delivered to the defendant The First National Bank of Schuyler, Nebraska, the promissory note and mortgage securing the same set forth in the answer and cross petition of said defendant, and said mortgage was duly recorded in the records of said Dodge county, at the time set forth in said cross petition and that there is now due and payable thereon from the defendant George Thrush to said defendant, First National Bank, the sum of $3,627.36 with interest from the 17th day of August, 1895, and the same is a first lien upon the south west quarter of section 20 in township 18, range 5 in Dodge county, Nebraska and the north half of the north west quarter and the south west quarter of the south west quarter of section 29, in township and range aforesaid and the said defendant, First National Bank, is entitled to a foreclosure of said lien,

and the aforesaid amount so found due bears interest at ten per cent. per annum from the date hereof; to which findings of the court and each of them the plaintiff excepts; and to which findings the defendants George Thrush and Mattie N. Thrush severally except.

2nd. That the defendant- George Thrush and Mattie N. Thrush executed and delivered the promissory note and mortgage securing the same set forth in the answer and cross-petition of the de-
6 fendant William H. Sumner; that the same was executed and delivered for the benefit of the defendant The Schuyler National Bank and the defendant Schuyler National Bank is entitled to the proceeds and avails of said promissory note and mortgage; that the said promissory note and mortgage was recorded, as alleged in the cross-petition of said defendant William H. Sumner, and that the same is tainted with usury, and there is now due and payable thereon from the defendant George Thrush the sum of $884.00, the same being the amount due and payable upon the note of $3229.00, set out in the cross-petition of said defendant, William H. Sumner, the sum of $2345, of the said $3229.00 having been paid as principal and interest on a usurious loan evidenced by the note set out in said cross-petition; that the said defendant, William H. Sumner, and Schuyler national bank, to and for the use and benefit of said Schuyler national bank, are entitled to the foreclosure of said mortgage; that said defendants are not to recover costs in this action nor any interest upon the aforesaid sum found due, and the same is a second lien subject only to the lien of the defendant First National Bank of Schuyler, as herein found, upon the north half of the south west quarter of section 20 in township 18, range 5, in said Dodge county, and upon the north half of the north west quarter and the south west quarter of the south west quarter of section 29, in township and range aforesaid;

3rd. The court finds that the defendants George Thrush and Mattie N. Thrush executed and delivered to the defendant Nebraska State Bank of Schuyler Nebraska, the promissory note of $4000.00, and mortgage securing the same, set forth in the answer and cross-petition of said defendant; that the same was given to secure a note of $4300. set forth in the answer and cross-petition of said defend-
ant, Nebraska State Bank, and that the said mortgage and
7 the note secured thereby were given as collateral to said $4300 which said note evidenced a usurious loan, and there is now due and payable to the defendant Nebraska State Bank upon the usury paid upon the said principal note, the sum of $1965.42, which sum shall bear no interest and the said defendant, Nebraska State Bank, shall recover no costs herein, and the said defendant Nebraska State Bank, is entitled to a foreclosure of said mortgage to satisfy said sum of $1965.42, and the same is a second lien upon the south half of the south west quarter of said section 20, and a third lien upon the balance of said premises; to which finding of the court specifying the said sum of $1965.42, to be due and payable on said mortgage to be a lien upon said premises the defendants George Thrush and Mattie N. Thrush severally excepted.

4th. The court finds that the defendants George Thrush, and Mattie N. Thrush, executed and delivered to the plaintiff the promissory note and mortgage securing the same set out in plaintiff's petition and there is now due and payable to the plaintiff from said defendants the sum of $1382.69 with interest from August 17th, 1895, and the said mortgage is a third lien upon the said south half of the south west quarter of said section 20 and a fourth lien upon the balance of said premises, and the same is entitled to bear interest at the rate of ten per cent. per annum upon the amount found due as aforesaid, and the plaintiff is entitled to a foreclosure of said mortgage to satisfy the sum so found due as aforesaid, with interest, and is entitled to recover costs.

5th. Upon the issues joined upon the answer and cross-petition of the defendants Englebert Folda and Margaret Folda, as administrators of the estate of Frank Folda, deceased, the court finds
8 in favor of the plaintiff and in favor of all the said other defendants and against said defendants, Englebert Folda and Margaret Folda, as administrators of the estate of Frank Folda, deceased.

6th. That the defendant Mattie N. Thrush is the owner at the present time of said premises, subject to the liens found as aforesaid, and the legal title in and to said premises is in the said defendant Mattie N. Thrush.

7th. That the following part of said premises, to-wit: is and constitutes the homestead of the defendant- Mattie N. Thrush and George Thrush, said defendants being husband and wife and occupying said premises with their family as a homestead.

It is therefore considered, adjudged, and decreed by the court that the said defendant, George Thrush, within 20 days from this day pay to the defendant The First National Bank of Schuyler, Nebraska, the sum of $3627.36, with interest as herein found; to the defendants William H. Sumner and Schuyler National Bank the sum of $884.00 without interest and without costs; to the defendant The Nebraska State Bank the sum of $1965.42 without interest and without costs; and to the plaintiff the sum of $1382.69 with interest from this day at ten per cent per annum and costs of suit, and that in default of such payments or any of them the said premises, to-wit: the south west quarter of section 20 in township 18, range 5, in said Dodge county, and the north half of the north west quarter and the south west quarter of the south west quarter, in section twenty nine in township and range aforesaid, may be sold and the proceeds thereof applied to the payment of said several liens in order of priority as hereinbefore found; that in such sale the north half of the south west quarter of said section 20 may be sold separately from the south half of the south west quarter of said section 20; that the said defendants and each of them
9 be, and they are hereby, barred and foreclosed of all rights, title, interest, lien, and equity of redemption in and to said premises and every part thereof, and that process issue upon the confirmation of said sale, directing the sheriff of said Dodge county to put the purchaser at such sale in possession of said premises; that this decree shall draw interest from this date upon *premises;*

that this decree shall draw interest from this date upon the amount found due the plaintiff and the defendant First National Bank of Schuyler, at the rate of ten per cent. per annum, and that said plaintiff and the defendant First National Bank of Schuyler each recover his and its costs in this action, and that the defendant-, Nebraska State Bank and Schuyler National Bank pay their costs in this action; — which decree and all of said findings the plaintiff and the defendants George Thrush and Mattie N. Thrush severally excepted.

It is further ordered that the said lien of the said First National Bank of Schuyler, Nebraska, be and the same is hereby postponed and made subject and inferior to the lien of the plaintiff herein.

To which the defendants William H. Sumner and The Schuyler National Bank and each of them except.

CONRAD HOLLENBECK, *Judge.*

And afterwards, on the 17th day of January, 1902, there was filed in the office of said clerk a certain receiver's report in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN
vs.
GEORGE THRUSH ET AL.

In the District Court of Colfax County.

SCHUYLER, NEBRASKA, *January* 2, 1902.

To the hon. judge of the district court, sixth judicial district:

On the first day of October, A. D. 1897, I was appointed receiver in the above entitled cause, "to take possession of north half of the south west quarter (N. ½ S. W. ¼) of section twenty (20) and the north half of the north west quarter (N. ½ N. W. ¼) and the south west quarter of the south west quarter of section twenty-nine (29) all in township eighteen (18) north, of range five (5) east, in Dodge county, Nebraska, to collect the rents of said lands and to apply the same to the payment of taxes, past due interest, and the claim of the Schuyler national bank."

I beg leave to report, that in accordance with the above order, I have rented the land annually, and attach herewith a statement of my receipts and expenditures, as such receiver.

Dec. 23, 1898.	To cash received for rent for the year 1898..		$400.00
Jan. 6, 1899.	" " " " " " " "	1899..	$400.00
March 2, 1900.	" " " " " " " "	1900..	$400.00
June 21, 1899.	Paid tax for the year 1898.....	$42.61	
Oct. 14, 1899.	Paid tax for the year 1897 and part pay't on certificate of tax sale for the years 1892, 1893, 1894, 1895 & 1896.....	$317.39	
Jan. 13, 1900.	Paid balance on certificate of tax sale for the years 1892, 1893, 1894, 1895 & 1896.....	27.63	
March 10, 1900.	Paid for revenue stamp for lease..	.25	
May 8, 1900.	Paid tax for the year 1899	40.91	
March 16, 1901.	Paid tax for the year 1900.....	37.05	
March 18, 1901.	Paid on past due interest.....	484.16	
		$1200.00	$1200.00

I have also on hand, a note in the sum of $400.00 due March 1st, 1902, given for rent of the premises, for the year 1901.

Respectfully submitted,

M. D. CAMERSON, *Receiver.*

11 And afterwards on the 17th day of January, 1902, there was entered of record in the office of said clerk a certain journal entry in the words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff,

vs.

GEORGE THRUSH, CHARLES THRUSH, SR., MATTIE N. THRUSH; Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased; J. C. Noyes, William H. Sumner, and The Nebraska State Bank of Schuyler, Nebraska; The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, Defendants.

Now on this 17th day of January, 1902, this cause came on for hearing on the report of W. D. Cameron the receiver heretofore appointed herein, and his motion for the approval thereof, and for his discharge from his said trust, and on consideration thereof, and the court being fully advised in the premises. It is ordered and adjudged that said report be and the same is in all things approved and confirmed and it is further ordered that said receiver be and he is hereby allowed and awarded the sum of $100 for his service as such receiver and that upon his filing a voucher showing the payment of the amount remaining in his hands, to-wit: the sum of $300 to the First National Bank of Schuyler, Nebraska, that he be discharged from his said trust.

And said cause coming on for further hearing on the application of the defendants William H. Sumner and The Schuyler
12 National Bank of Schuyler, Nebraska, for the court to fix the amount of a supersedeas bond, it is hereby ordered that said bond be and the same hereby is fixed at the sum of $500 and that upon the filing and approval of such bond by the clerk of this court the decree herein is superseded pending the appeal of said cause.

CONRAD HOLLENBECK, *Judge.*

And afterwards, on the 17th day of January, 1902, there was filed of record in the office of said clerk a certain supersedeas bond in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff, *vs.* GEORGE THRUSH, MATTIE THRUSH, THE FIRST National Bank of Schuyler, Nebraska; The Nebraska State Bank, William H. Sumner, The Schuyler National Bank of Schuyler, Nebraska; Englebert Folda, Martha Folda, Administrators of the Estate of F. Folda, Deceased, Defendants.	Supersedeas Bond.

We, William H. Sumner and The Schuyler National Bank of Schuyler, Nebraska, as principal and Melville D. Cameron and Martin L. Weaver as sureties, are held and firmly bound unto James Gadsden, The First National Bank of Schuyler, Nebraska, The Nebraska State Bank, George Thrush and Mattie Thrush, in the sum of $500, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such, that whereas the
13 said William H. Sumner and the said Schuyler National Bank of Schuyler, Nebraska, have appealed to the supreme court of the State of Nebraska, from the decree and order of sale of the said district court in the above entitled suit, entered on the 4th day of January, 1902, directing the sale of the following described real estate, to-wit: The north half of the southwest quarter of section twenty, in township eighteen, range five, in said Dodge county, and upon the north half of the northwest quarter and the southwest quarter of the southwest quarter of section twenty-nine, in township and range aforesaid, and Honorable Conrad Hollenbeck, judge of said court, has fixed the amount of a bond to be given for the purpose of superseding said decree and order of sale in the sum of five hundred dollars.

Now if said William H. Sumner and the said Schuyler National Bank of Schuyler, Nebraska, shall prosecute such appeal without delay and will not during the pendency of *of* such appeal commit,

or suffer to be committed, any waste upon said described real estate, then this obligation is to be void, otherwise to remain in full force.

WILLIAM H. SUMNER AND
THE SCHUYLER NATIONAL BANK OF
SCHUYLER, NEBRASKA,
By C. J. PHELPS, *Their Attorney.*
MELVILLE D. CAMERSON.
MARTIN L. WEAVER.

Jan'y 17, 1902.—Above bond approved.

[SEAL.] J. M. CRUICKSHANK,
Clerk of District Court, Dodge County, Nebr.

14 And afterwards, on the 17th day of January, 1902, there was filed of record in the office of said clerk a certain certificate in the words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN
vs.
GEORGE THRUSH ET AL.

THE STATE OF NEBRASKA, }
Dodge County. }

I, Conrad Hollenbeck, one of the judges of the district court of in and for said county, do hereby certify that on the hearing of this cause on the 4th day of January, 1902, no other or further testimony was taken in said cause, but that the findings and decrees at that time made were based upon the proofs heretofore made in said cause, and embodied in the bill of exceptions, heretofore settled herein, and that said bill of exceptions contains all of the evidence taken or introduced in said cause.

Dated January 17, 1902.

CONRAD HOLLENBECK, *Judge.*

The original certificate, of which the foregoing is a true and correct copy, was submitted to me this 17th day of January, 1902, and by me approved without suggestion of amendment thereto.

GEORGE H. THOMAS,
Att'y for Appellees.

THE STATE OF NEBRASKA, }
Dodge County, } *ss:*

15 I, J. M. Cruickshank, clerk of the district court in and for Dodge county, Nebraska, do hereby certify that the foregoing is a full, true and complete transcript of the mandate and proceedings in the case of James Gadsden *vs.* George Thrush, Charles Thrush, Sr., Mattie N. Thrush, Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased,

J. C. Noyes, William H. Sumner and The Nebraska State Bank of Schuyler, Nebraska, The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, the mandate on folio- 458–459 on Journal 9, decree on folio- 555–556–557–558–559 and 510, receiver's report, journal entry on folio- 570–571 Journal 9, supersedeas bond and certificate of Conrad Hollenbeck, judge, as fully as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said district court this 18th day of January, A. D., 1902.

[SEAL.] J. M. CRUICKSHANK, *Clerk.*

(Endorsed:) 12533. Transcript. James Gadsden *vs.* George Thrush, *et al.* Transcript. Supreme court of Nebraska. Filed Jan. 22 1902 Lee Herdman clerk.

And on the same day, to-wit, on the 22nd day of January, there was filed in the office of the clerk of said supreme court of Nebraska, a certain certificate in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN
vs.
GEORGE THRUSH ET AL.

THE STATE OF NEBRASKA, }
Dodge County. }

I. Conrad Hollenbeck, one of the judges of the district
16 court of in and for said county, do hereby certify that on the hearing of this cause on the 4th day of January, 1902, no other or further testimony was taken in said cause but that the findings and decree at that time made were based upon the proofs heretofore made in said cause, and embodied in the bill of exceptions heretofore settled herein, and that said bill of exceptions contains all of the evidence taken or introduced in said cause.

Dated January 17, 1902.

CONRAD HOLLENBECK, *Judge.*

(Endorsed:) 12533. James Gadsden *v.* George Thrush, *et al.* Filed at — o'clock, - - m. Jan. 17 1902. J. M. Cruickshank, clerk of district court. Certificate. Supreme court of Nebraska. Filed Jan. 22 1902 Lee Herdman clerk.

And on the same day to-wit, on the 22nd day of January, 1902, there was filed in the office of the clerk of said supreme court a transcript in words and figures following, to-wit:

17-30 Pleas had before the district court of the sixth judicial district of Nebraska, within and for the county of Dodge, at a term thereof begun and holden in the city of Fremont, in said county and State, on the 15th day of April, one thousand eight hundred and ninety-five.

Present: Honorable William Marshall, judge; James Milliken, sheriff; J. M. Shively, clerk.

* * * * * * *

31 On the 17th day of November, 1894, there was filed in the office of the clerk of said court an answer and cross-petition, which is in the words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff,
vs.
GEORGE THRUSH, MATTIE N. THRUSH, NEBRASKA STATE BANK, William H. Sumner, Englebert F. Folda and Martha Folda, Administrators of the Estate of F. Folda, Deceased, Defendants.

And now comes the defendant William H. Sumner, and for answer to the petition of the plaintiff, filed in the above-entitled action, admits the execution of the note and mortgage therein set forth. He denies each and every other allegation in said petition contained and every part thereof.

This defendant for further answer and cross-petition alleges that on the 8th day of August, 1890, the defendant George Thrush and Charles Thrush, *St.*, were indebted to the Schuyler National Bank of Schuyler, Nebraska, in the sum of $5,000.00, as evidenced by their certain promissory note of that date, payable to the order of said Schuyler national bank, six months after the date thereof, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid.

This defendant further alleges that said note was renewed from time to time. On the 31st day of March, 1894, there remained due and unpaid of said indebtedness due to the Schuyler national bank, as evidenced by said $5,000.00 note of date August 8, 1890, the sum of $3,229.00, and on said 31st day of March, 1894, the defendant George Thrush executed and delivered to the Schuyler national bank a certain promissory note therefor which was as follows:

32 "$3,229.00. SCHUYLER, NEB., *Mar.* 31, 1894.

One hundred & eighty days after date we or either of us promise to pay to Schuyler national bank or order three thousand two hundred twenty-nine dollars, for value received, negotiable and payable, without defaication or discount, at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of 10 per cent. per annum, payable semi-annually, from maturity until paid; and in case of a

suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or endorsers hereby consent that time of payment may be extended without notice thereof, and waive notice and notice of non-payment.

GEORGE THRUSH.

Due ——— —. No. —. P. O., ———.
Secured by —."

No part of said note has been paid, and there is now due thereon from said defendant to said Schuyler national bank the sum of $3,229.00 and interest at ten per cent. from September 27, 1894.

This defendant further alleges that on the 8th day of August, 1890, to secure said indebtedness of $5,000.00 then due and owing to the Schuyler national bank, as evidenced by their promissory note, the defendants George Thrush and Mattie N. Thrush executed and delivered their certain promissory note, of which the following is a true copy:

"$5,000. SCHUYLER, NEB., *August* 8, 1890."

"Two years after date we or either of us promise to pay to Wm. H. Sumner or order five thousand dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of ten per cent. per annum, payable annually, from date until paid; and in case of a suit brought to collect this note I will also pay this plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
MATTIE N. THRUSH."

Due ———.
No. —.
P. O., ———.

To secure the payment of said last-mentioned note the defendants George Thrush and Mattie N. Thrush on said 8th day of August, 1890, executed and delivered their mortgage deed and thereby conveyed to this defendant the following-described real estate, situated in Dodge county, Nebraska, namely: The southwest quarter of section nineteen, township eighteen, range five; also north half of the southwest quarter of section twenty, township eighteen, range five; also north half of the northwest quarter of sec-
33 tion twenty-nine, township eighteen, range five; also southwest quarter of the southwest quarter of section twenty-nine, township eighteen, range five; which deed contained the following conditions: That if the said George Thrush, his heirs, executors, or administrators shall pay or cause to be paid to the said William H. Sumner, his heirs, executors, administrators, or assigns, said sum of

$5,000.00 on the 8th day of August, 1892, together with interest thereon at ten per cent., payable annually, according to the tenor and effect of the one promissory — of said George Thrush, bearing even date with these presents, then these presents to be void; otherwise to be and remain in full force.

Said mortgage was duly recorded in the office of the recorder of real-estate mortgages of Dodge county on the 24th day of September, 1890, in Book 2 of Mortgages, on page 145.

This defendant further alleges that the note and mortgage so as aforesaid executed and delivered by the defendants George Thrush and Mattie N. Thrush to him were executed and delivered to him as trustee for the use and benefit of said Schuyler national bank and to secure the indebtedness of said George Thrush to said bank.

That said debt so secured on the 8th day of August, 1890, by said mortgage deed was a debt previously contracted.

That said mortgage was made in good faith and in the name of this defendant for the benefit of said Schuyler national bank.

No proceedings at law have been had for the recovery of the debt secured by said mortgage or any part thereof, and there is now due from the defendant- George Thrush and Mattie N. Thrush to this defendant, for the use and benefit of the Schuyler national bank, the sum of $3,229.00 and interest at ten per cent. from September 27th, 1894.

This defendant further alleges that the Nebraska State bank, a corporation duly incorporated under and by virtue of the laws of the State of Nebraska, has an interest in said premises by virtue of a certain note and mortgage executed to it by the defendant- George Thrush and Mattie N. Thrush; that this defendant alleges that said lien and interest of the Nebraska State bank are inferior, junior, subsequent, and subject to the lien of this defendant.

This defendant further alleges that the defendants Englebert F. Folda and Martha Folda, administrators of the estate of Frank Folda, deceased, have an interest in said premises by virtue of a certain judgment recovered by said Frank Folda in his lifetime against the defendant George Thrush and others; this defendant alleges that said judgment lien is subject, inferior, and subsequent to the lien and interest of this defendant.

This answering defendant therefore prays that an account may be taken of the amount due on said note and mortgage, that the priority of liens may be determined, and that the lien and interest of the plaintiff and the defendants The Nebraska State Bank and Englebert F. Folda and Martha Folda, administrators of the estate of Frank Folda, deceased, may be adjudged inferior and subject to the lien of this answering defendant, and that said defendant-,
George Thrush and Mattie N. Thrush, may be foreclosed of all
34 equity of redemption or other interest in said mortgaged
premises, and that said premises may be sold according to law, and out of the proceeds thereof the lienholders may be paid the amount adjudged to be due them in the order of their priority, with interest and costs of the suit.

And that the defendants George Thrush and Mattie N. Thrush

be adjudged to pay any deficiency which may remain after applying the proceeds of said sale to the payments of said debts, and for such other and further relief as may be just and equitable.

PHELPS & SABIN,
Attorneys for Defendant W. H. Sumner.

STATE OF NEBRASKA, } ss:
Colfax County, }

C. J. Phelps, being first duly sworn, deposes and says that he is one of the attorneys of the plaintiff in the above-entitled suit; that the plaintiff is a non-resident of this State and absent therefrom; that he has read the foregoing answer and knows the contents, and that the facts therein stated are true, as he verily believes.

C. J. PHELPS.

Subscribed in my presence and sworn to before me this 16th day of November, 1894.

[SEAL.]

C. O. SABIN,
Notary Public.

My commission expires Feb'y 17, 1899.

And on the 22nd day of December, 1894, there was filed in the office of the clerk of said court an answer, which is in the words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff, *vs.* GEORGE THRUSH, MATTIE N. THRUSH, Nebraska State Bank, William H. Sumner, Englebert Folda, Martha Folda, Administrators of the Estate of Frank Folda, Deceased, Defendants.	Answer of Defendant George Thrush to the Cross-petition of Defendant William H. Sumner.

1. Comes now the said defendant, George Thrush, and for answer to the cross-petition of the defendant William H. Sumner admits the execution and delivery of the promissory note and mortgage securing the same for $5,000, bearing date of August 8th, 1890, to the defendant, William H. Sumner, and denies each and every other allegation and averment in said cross-petition contained, and denies that there is due upon said note the amount of money claimed by said defendant.

2. Further answering, this defendant avers that the said promissory note of $5,000 and the mortgage securing the same were made
35 and delivered to said William H. Sumner as a part of a usurious transaction, and the same were being held by said Sumner as collateral security to usurious loans of money, and the said amount was made up of usurious loans, and which said loans were from time to time renewed at usurious rates of interest, as is hereinafter more specifically set forth.

3. That heretofore, to wit, on the 9th day of August, 1889, the defendant George Thrush, with one William Thrush, executed and delivered a note to the Schuyler National Bank of Schuyler, Nebraska, mentioned in the cross-petition of the defendant Sumner, for the sum of $387.75, in pursuance of a mutual agreement entered into by the said defendant, George Thrush, and said Schuyler national bank, by the terms of which the Schuyler national bank was to lend the said defendant, George Thrush, and William Thrush the sum of $387.75 for 90 days from and after the date of said note, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank loaned to the said defendant, George Thrush, and the said William Thrush the said sum of $387.75, and then received and reserved and was paid by the defendant George Thrush the sum of $12.02 as interest thereon for a period of 90 days under the agreement aforesaid, which said loan of $387.75 is and continued to be a part of said loan, to which said note of $5,000 of the said defendant, George Thrush, and Mattie N. Thrush is now held as collateral security by the defendant Sumner.

4. That thereafter, to wit, on the 9th day of November, 1889, upon the expiration of the aforesaid period of 90 days, the aforesaid loan and note were renewed for a period of six months by the defendant George Thrush giving a new note, signed by Charles Thrush, Sr., as security for him, of that date, to evidence the same, under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of six months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed said loan and continued the same, and the defendant George Thrush, to evidence the same, upon said day executed and delivered his note, with the signature thereon of Charles Thrush, Sr., as security, for the sum of $387.75, and the said The Schuyler national bank the- received, reserved, and was paid by the defendant George Thrush the sum of $23.65 as interest on said $387.75 for said period of six months under the agreement aforesaid, and the aforesaid renewal is one of the notes which entered into and of which amount was made up collateral to which the defendant Sumner holds the note and mortgage securing the same in his petition set forth.

5. That thereafter, to wit, on the 12th day of May, 1890, upon the expiration of the aforesaid period of six months, the aforesaid loan and note were renewed for the period of four months by the defendant George Thrush giving a new note, signed by Charles Thrush,
36 Sr., as security for him, of that date, to evidence the same, under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of four months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evi-

dence the same, upon said day executed and delivered his note with the signature thereon of Charles Thrush, Sr., as security, for the sum of $387.75, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $15.90 as interest on said $387.75 for said period of four months under the agreement aforesaid, and the aforesaid renewal is one of the notes which enters into and makes up part of the amount to which the defendant Sumner holds the said note and mortgage securing the same as collateral security.

6. That heretofore, to wit, on the 26th day of September, 1889, the defendant George Thrush executed and delivered to the said The Schuyler National Bank of Schuyler, Nebraska, his note, with the signature of Charles Thrush, Sr., as security, for the sum of $160 in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to lend the defendant George Thrush the sum of $160 on said day for the period of 90 days from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank loaned the defendant George Thrush the said sum of $160 as the sole consideration for said note, and then received, reserved, and was paid by the defendant George Thrush the sum of $4.96 as interest thereon for the period of 90 days under the agreement aforesaid, which said loan of $160 and the several renewals thereof enters into and makes up the amount for which the said collateral note and mortgage to secur*ing* the same is held by the defendant Sumner.

7. That thereafter, to wit, on the 30th day of December, 1889, upon the expiration of the aforesaid period of 90 days the aforesaid loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of six months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement, the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, upon said day executed and delivered his note, with the signature thereon of Charles Thrush, Sr., as security, for the sum of $160, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $9.76 as interest on said $160
37 for said period of six months under the agreement aforesaid, and the aforesaid renewal and loan enters into and makes up a part of the amount to which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

8. That thereafter, to wit, on the 3rd day of July, 1890, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of four months

by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of four months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant, to evidence the same, upon said date executed and delivered his note, with the signature thereon of Charles Thrush, Sr., as security, for the sum of $160, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $6.56 as interest on said $160 for said period of four months, and the aforesaid renewal and loan enters into and makes a part of the amount to which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

9. That heretofore, to wit, on the 27th day of July, 1889, the defendant George Thrush executed and delivered a note to the said The Schuyler national bank for the sum of $100 under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to lend the defendant George Thrush the sum of $100 on said day for the period of 90 days from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement said Schuyler national bank loaned the defendant George Thrush the said sum of $100 as sole consideration for said promissory note, and then received, reserved, and was paid by the defendant George Thrush the sum of $3.10 as interest thereon for the period of 90 days under the agreement aforesaid, which said loan of $100 and the several renewals thereof enters into and constitutes a part of the sum to which the aforesaid note of $5,000 and mortgage securing the same is held by the defendant Sumner as collateral security, and which said promissory note was also signed by Charles Thrush, Sr., as surety for this defendant.

10. That thereafter, to wit, on the 26th day of October, 1889, upon the expiration of the aforesaid period of 90 days, the aforesaid loan and note was renewed and continued for the period of six months by the defendant giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler
38 national bank was to renew and continue said loan for the period of six months from and after said date at 12 per cent. interest per annum; that in pursuance of the said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, executed and delivered his note, with the signature of Charles Thrush, Sr., thereon as security, for the sum of $100, and the said The Schuyler national bank then received, reserved, and was paid by the defend-

ant George Thrush the sum of $6.10 as interest on said $100 for said period of six months, and the aforesaid renewal and loan entered into and made a part of the amount to which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

11. That thereafter, to wit, on the 29th day of April, 1890, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of four months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of four months at 12 per cent. interest per annum; that in pursuance of the agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, executed and delivered his note, with the signature of Charles Thrush, Sr., thereon as security, for the sum of $100, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $4.10 as interest on said sum of $100 for said period of four months, and the aforesaid renewal and loan entered into and made a part of the amount to which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

12. That heretofore, to wit, on the 12th day of February, 1890, the defendant George Thrush executed and delivered his note to the said The Schuyler national bank for the sum of $500 in pursuance of a mutual agreement entered into by the defendant George Thrush and the said Schuyler national bank, by the terms of which the said The Schuyler national bank was to lend to the defendant George Thrush the sum of $500 on said day for the period of 90 days from and after said day at 12 per cent. per annum; that in pursuance of said agreement the said The Schuyler national bank loaned the defendant George Thrush the sum of $500 as the sole consideration for the said note, and then the said The Schuyler national bank received and reserved and was paid by the defendant George Thrush the sum of $15.50 as interest thereon for the period of 90 days under the agreement aforesaid, which said loan of $500 enters into and makes a part of the amount to which as collateral security the defendant Sumner holds the aforesaid note and mortgage of $5,000.

13. That thereafter, to wit, on the 13th day of May, 1890, upon the expiration of the aforesaid period of 90 days, the aforesaid loan
39 and note was renewed and continued for the period of 90 days by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of 90 days at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush,

to evidence the same, executed and delivered his note, with the signature of Charles Thrush, Sr., thereon as security, for the sum of $500, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $15.50 as interest on said sum of $500 for said period of 90 days, and the aforesaid renewal and loan enters into and makes a part of the amount in which the defendant Sumner holds the said note of $5,000, and mortgage securing the same as collateral security.

14. That heretofore, to wit, on the 24th day of June, 1890, the defendant George Thrush executed and delivered his note to the said The Schuyler national bank for the sum of $112 in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to lend the defendant George Thrush the sum of $112 on said date for the period of four months from and after said date at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank loaned the defendant George Thrush the sum of $112 as the sole consideration for said note, and then received, reserved, and was paid by the defendant George Thrush the sum of $4.60 as interest thereon for the period of four months under the agreement aforesaid, which said loan of $112 enters into and makes a part of the amount to which as collateral security the defendant Sumner holds the aforesaid note of $5,000 and mortgage securing the same.

15. That heretofore, to wit, on the 8th day of August, 1890, the said The Schuyler national bank at that time holding the several notes hereinbefore set forth and their renewals, to wit, being one note for $387.75, bearing date of May 12th, 1890; one note for $160, bearing date of July 3rd, 1890; one note for $100, bearing date of April 29th, 1890; one note for $500, bearing date of May 13th, 1890; one note for $112, bearing date of June 24th, 1890, and also one note by it held from E. L. True, for the sum of $176.80, and bearing date of August 2nd, 1890, the said The Schuyler national bank and the defendant George Thrush on said day entered into an agreement whereby the aforesaid usurious loans and notes were all reckoned together with all the usury thereon, and the said The Schuyler national bank loaned said defendant, George Thrush, in addition the sum of $3,273.29 in cash, and thereby a note of $5,000 was made and all the aforesaid notes merged therein; that on the 8th day of August, 1890, pursuant to the aforesaid agreement, the defendant George Thrush executed and delivered a note for $5,000 to said The Schuyler national bank in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the aforesaid loads for the period of six months from and after said day at 12 per cent. interest per annum upon said aggregate sum of $5,000; that in pursuance of said agreement the said The Schuyler national bank loaned to the defendant George Thrush the aforesaid sum of $3,273.29 on said day and added thereto the amounts of usury due upon all the foregoing aforesaid notes, and then the said

The Schuyler national bank received, reserved, and was paid by the defendant George Thrush the sum of $305 as interest thereon for the period of six months under the agreement aforesaid, which said loan of $3,273.29 and the aforesaid usurious notes thereto added are the sole and only consideration for the said sum of $5,000 note that day executed and delivered by said defendant, George Thrush, to the said The Schuyler national bank, and the aforesaid loan and usurious transaction and the several renewals thereof are and constitute the amount and loan to which as collateral security the defendant Sumner holds the promissory note of $5,000 and mortgage securing the same.

16. That thereafter, to wit, on the 11th day of February, 1891, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the aforesaid loan for the period of six months from and after said day at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, upon said day executed and delivered said note for $5,000 to the said The Schuylar national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $305 as interest on said sum of $5,000 for said period of six months under the agreement aforesaid, and which said loan and renewal is the same to which the defendant Sumner holds the promissory note of $5,000 and mortgage securing the same as collateral security.

17. That thereafter, to wit, on the 14th day of August, 1891, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the
41 *the* aforesaid loan for the period of six months at 12 per cent. interest per annum.

That in pursuance of said agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant, to evidence the same, upon said day executed and delivered his note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $305 as interest on said sum of $5,000 for said period of six months under the agreement aforesaid, and which said loan and renewal is the same to which the defendant Sumner holds the promissory note of $5,000 and mortgage securing the same as collateral security.

18. That thereafter, to wit, on the 17th day of February, 1892, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of 60 days by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of 60 days at 12 per cent. per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant George Thrush, to evidence the same, upon said day executed and delivered his note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $105 as interest on said sum of $5,000 for said period of 60 days under the agreement aforesaid, and which said loan and renewal is the same *of $5,000* to which the defendant Sumner holds the promissory note and mortgage securing the same as collateral security.

19. That thereafter, to wit, on the 20th day of April, 1892, upon the expiration of the period of 60 days, the aforesaid loan and note was renewed and continued for the period of 60 days by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of an agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of 60 days at 12 per cent. interest per annum; that in pursuance of the aforesaid agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant George Thrush, to evidence the same, executed and delivered upon said day his note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $105 as interest on said sum of $5,000 for said period of 60 days under the agreement aforesaid, and which loan and renewal *is* the same to which said defendant Sumner holds the promissory note and mortgage securing the same as collateral security.

20. That thereafter, to wit, on the 22nd day of June, 1892,
42 upon the expiration of the aforesaid period of 60 days, the aforesaid loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of six months at 12 per cent. interest per annum.

That in pursuance of the aforesaid agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant George Thrush, to evidence the same, executed and de-

livered upon said day his note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $311.80 as interest on said sum of $5,000 for said period of six months under the agreement aforesaid, and which loan and renewal is the same to which the defendant Sumner holds the promissory note and mortgage securing the same as collateral security.

21. That thereafter, to wit, on the 22nd day of December, 1892, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of an agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan at the rate of 12 per cent. interest per annum, the aforesaid note so given in renewal being made on demand; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant, to evidence the same, upon said day executed and delivered his note for the sum of $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid the sum of $330.33 as interest on said $5,000 from said 22nd day of December, 1892, until the 15th day of July, 1893, at which time the aforesaid note was again renewed and continued by another note being giv*ing*, and which said note and its renewal are and constitute a part of the same loan to which the defendant Sumner holds a collateral, the $5,000 note and mortgage securing the same of defendants George Thrush and Mattie N. Thrush set out in his cross-petition.

22. That heretofore, to wit, on the 15th day of July, 1893, the last aforesaid note expired, and the same was again renewed and continued until the 20th day of January, 1894, by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler National Bank, by the terms of which the said The Schuyler National Bank was to renew and continue said loan until the 20th day of January, 1894, at 12 per cent. interest per annum during the time of said note; that there had, prior to said 15th day of July, 1893,
43 two payments been made upon the princip*le* of said note, to wit, March 4th, 1893, the sum of $1,600, and March 1st, 1893, the sum of $400, and the said note on said 15th day of July in renewal, as aforesaid, was made for $3,212.78; that in pursuance of said agreement the said The Schuyler national bank renewed and continued the said loan in the said sum of $3,212.78, and the defendant, to evidence the same, upon said day executed and delivered his note for the sum of $3,212.78, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $201.34 as interest on said sum of $3,212.78 from the 15th day of July, 1893, to the 23rd day of January, 1894, under

the agreement aforesaid, and which renewal herein specified is the renewal of the loan to which said defendant, Sumner, holds the said promissory note and mortgage securing the same of the defendant George Thrush and Mattie N. Thrush as collateral security thereto.

23. That heretofore, to wit, on the 23rd day of January, 1894, upon the expiration of the last aforesaid promissory note, the aforesaid loan and note was renewed and continued for the period until April 1st, 1894, by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan until the 1st day of April, 1894, and during the time of such continuance the said defendant, George Thrush, was to pay 12 per cent. interest per annum thereof; that in pursuance of said agreement the said The Schuyler national bank renewed and continued the said note and loan, making such renewal note to be of the sum of $3,384.12, and the said George Thrush, to evidence the same, upon said day executed and delivered his note for the said sum of $3,384.12 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $171.34 as interest on said $3,384.12 for said period, to wit, from January 23rd, 1894, to April 1st, 1894, and the sole consideration of this last renewal note was the said balance of said loan of $3,212.78, and the said loan, being the said note herein, is the loan to which the defendant Sumner holds the promissory note and mortgage securing the same of the defendant George Thrush and Mattie N. Thrush as collateral security.

24. That thereafter, to wit, on the 31st day of March, 1894, upon the expiration of the last aforesaid note, the aforesaid loan and note was renewed and continued for the period of 180 days from and after said 31st day of March, 1894, by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of 180 days from and after said date, at 12 per cent. interest per annum; that in pursuance of
44 said agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant, to evidence the same, upon said 31st day of March, 1894, executed and delivered his note for the sum of $3,229 to the said The Schuyler national bank, which is the note copy of which is set forth in the cross-petition of the defendant Sumner, and then the said The Schuyler national bank received, reserved, and was paid by the defendant George Thrush the sum of $196 as interest on said $3,229 for said period of 180 days under the agreement aforesaid, and the aforesaid renewal was the sole consideration for the said $3,229 note.

And this defendant avers that by the payments made as aforesaid and the usury charged, as heretofore specifically set forth, that at the time of the execution and coming due of said $3,229 note, copy of

which is set out in the cross petition of the defendant Sumner, there was, by the reason of the payments made thereon of usury, but small amount due as balance on the aforesaid loan evidenced by said note, to wit, the sum not exceeding $——, as the sole and only consideration of the said $3,229 note, and that there was no consideration whatsoever for the $5,000 note of the defendants George Thrush and Mattie N. Thrush and mortgage securing the same, *h*ave and except such balance as might be owing upon the aforesaid loan, and the same is held only for such purpose by said defendant, Sumner, and for no other purpose.

That the said note of $5,000 of the defendants George Thrush and Mattie N. Thrush, together with the mortgage securing the same, were not executed and delivered to said William H. Sumner upon any consideration whatsoever, but the same are simply held by said defendant as collateral security to the amount owing by the defendant George Thrush on the said indebtedness now being evidenced by said $3,229 note, in this, that the said note of $5,000 and the mortgage securing the same were executed and delivered by this defendant and Mattie N. Thrush to said Sumner for the purpose that said Sumner might protect therewith said bank on account of the indebtedness of said George Thrush to said bank, and said note and mortgage *was* accepted by said Sumner with the knowledge and consent of said bank, and because said bank refused to take said mortgage and said Sumner in nowise protected said loan or advanced any money thereon and at the time of the maturity thereof, by virtue of the premises and the payments of usurious and illegal interest made thereon, as aforesaid, there was due and owing, after deducting the payments made upon the principal and the said payments of usurious interest, the small balance, to wit, of $252.20, and for the aforesaid balance the said defendant, Sumner, is entitled to a lien upon said premises under and by virtue of said mortgage and promissory note of $5,000.

Wherefore this defendant prays that the aforesaid sums of money so paid, received, and reserved as usurious and illegal interest, as aforesaid set forth, may be deducted from the princip*le* of said loan and the said defendant, Sumner, may be decreed to have a
45 lien upon the note of $5,000 and mortgage securing for such balance as shall be found, to wit, the sum of $252.20, and that said defendant be required to pay all his costs in this action.

FRICK & DOLEZAL,
Attorneys for Defendant.

STATE OF NEBRASKA, } *ss.*:
Colfax County, }

George Thrush, being first duly sworn, on his oath deposes and says that — is the defendant making the foregoing answer, and that he believes the facts stated in this answer to be true.

GEORGE THRUSH.

Subscribed in my presence and sworn to before me this 15 day of December, 1894.

JNO. F. HOAGLAND,
Notary Public.

[SEAL.]

And on the 22nd day of December, 1894, an answer was filed in the words and figures following to wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSEN, Plaintiff, *vs.* GEORGE THRUSH, MATTIE N. THRUSH, Nebraska State Bank, William H. Sumner, Englebert Folda, Martha Folda, Administrators of the Estate of Frank Folda, Deceased, Defendants.	Answer of Defendant Mattie N. Thrush to the Cross-petition of Defendant William H. Sumner.

1. Comes now the said defendant, Mattie N. Thrush, and for answer to the cross-petition of the defendant William H. Sumner admits the execution and delivery of the promissory note and mortgage securing the same for $5,000, bearing date of August 8th, 1890, to the defendant William H. Sumner, and denies each and every other allegation and averment in said cross-petition contained, and denies that there is due upon said note the amount of money claimed by said defendant.

2. Further answering, this defendant avers that the said promissory note of $5,000 and the mortgage securing the same were made and delivered to said William H. Sumner as a part of a usurious transaction and the same were being held by said Sumner as collateral security to usurious loans of money, and the said amount was made up of usurious loans, and which said loans were from time to time renewed at usurious rates of interest, as is hereinafter more specifically set forth.

3. That theretofore, to wit, on the 9th day of August, 1889, the defendant George Thrush, with one William Thrush, executed and delivered a note to the Schuyler National Bank of Schuyler, Nebraska, mentioned in the cross-petition of the defendant Sumner, for the sum of $387.75 in pursuance of a mutual agreement entered into by the said defendant, George Thrush, and said The
46 Schuyler national bank, by the terms of which the Schuyler national bank was to lend the said defendant, George Thrush, and William Thrush the sum of $387.75 for 90 days from and after the date of said note, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank loaned to the said defendant, George Thrush, and the said William Thrush the said sum of $387.75 and then received and reserved and was paid by the defendant George Thrush the sum of $12.02 as interest thereon for the period of 90 days, under the agreement aforesaid, which said loan of $387.75 is and continued to be a part of the said loan to which said note of $5,000 of the defendant-,

George Thrush and Mattie N. Thrush, is now held as collateral security by the defendant Sumner.

4. That thereafter, to wit, on the 9th day of November, 1889, upon the expiration of the aforesaid period of 90 days, the aforesaid loan and note were renewed for the period of six months by the defendant George Thrush giving a new note signed by Charles Thrush, Sr., as security for him, of that date, to evidence the same, under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of six months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed said loan and continued the same, and the defendant George Thrush, to evidence the same, upon said day executed and delivered his note, with the signature thereon of Charles Thrush, Sr., as security, for the sum of $387.75, and the said The Schuyler national bank the- received, reserved, and was paid by the defendant George Thrush the sum of $23.65 as interest on said $387.75 for said period of six months under the agreement aforesaid, and the aforesaid renewal is one of the notes which entered into and of which amount was made up collateral to which the defendant Sumner holds the note and mortgage securing the same in his petition set forth.

4. That thereafter, to wit, on the 12th day of May, 1890, upon the expiration of the aforesaid period of six months, the aforesaid loan and note were renewed for the period of four months by the defendant George Thrush giving a new note signed by Charles Thrush, Sr., as security for him, of that date, to evidence the same, under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of four months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, upon said day executed and delivered his note, with the signature thereon of Charles Thrush, Sr., as security, for the sum of $387.75, and the said The Schuyler national bank then re-
47 ceived, reserved, and was paid by the defendant George Thrush the sum of $15.90 as interest on said $387.75 for said period of four months under the agreement aforesaid, and the aforesaid renewal is one of the notes which enters into and makes up part of the amount to which the defendant Sumner holds the said note and mortgage securing the same as collateral security.

6. That heretofore, to wit, on the 26th day of September, 1889, the defendant George Thrush executed and delivered to the said The Schuyler National Bank of Schuyler, Nebraska, his note, with the signature of Charles Thrush, Sr., as security, for the sum of $160 in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to lend the

defendant George Thrush the sum of $160 on said day for the period of 90 days from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank loaned the defendant George Thrush the said sum of $160 as the sole consideration for said note, and then received, reserved, and was paid by the defendant George Thrush the sum of $4.96 as interest thereon for the period of 90 days under the agreement aforesaid, which said loan of $160 and the several renewals thereof enters into and makes up the amount for which the said collateral note and mortgage to secur*ing* the same is held by the defendant Sumner.

7. That thereafter, to wit, on the 30th day of December, 1889, upon the expiration of the aforesaid period of ninety days, the aforesaid loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of six months from and after said date, at 12 per cent. interest per annum: that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, upon said day executed and delivered his note, with the signature thereon of Charles Thrush, Sr., as security, for the sum of $160, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $9.76 as interest on said $160 for said period of six months under the agreement aforesaid, and the aforesaid renewal and loan enters into and makes up a part of the amount to which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

8. That thereafter, to wit, on the 3rd day of July, 1890, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of four months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The
48 Schuyler national bank was to renew and continue the said loan for the period of four months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant, to evidence the same, upon said date executed and delivered his note, with the signature thereon of Charles Thrush, Sr., as security, for the sum of $160, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $6.56 as interest on said $160 for said period of four months, and the aforesaid renewal and loan enters into and makes a part of the amount to which the

defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

9. That heretofore, to wit, on the 27th day of July, 1889, the defendant George Thrush executed and delivered a note to the said The Schuyler national bank for the sum of $100 under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to lend the defendant George Thrush the sum of $100 on said day for the period of 90 days from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement said Schuyler national bank loaned the defendant George Thrush the said sum of $100 as sole consideration for said promissory note, and then received, reserved, and was paid by the defendant George Thrush the sum of $3.10 as interest thereon for the period of 90 days under the agreement aforesaid, which said loan of $100 and the several renewals thereof enters into and constitutes a part of the sum to which the aforesaid note of $5,000 and mortgage securing the same is held by the defendant Sumner as collateral security, and which said promissory note was also signed by Charles Thrush, Sr., as surety for this defendant.

10. That thereafter, to wit, on the 26th day of October, 1889, upon the expiration of the aforesaid period of 90 days, the aforesaid loan and note was renewed and continued for the period of six months by the defendant giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of six months from and after said date, at 12 per cent. interest per annum; that in pursuance of the said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, executed and delivered his note, with the signature of Charles Thrush, Sr., thereon, as security, for the sum of $100, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $6.10 as interest on said $100 for said period of six months, and the aforesaid renewal and loan entered into and made a part
49 of the amount to which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

11. That thereafter, to wit, on the 29th day of April, 1890, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of four months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of four months, at 12 per cent. interest per annum; that in pursuance of the agreement the said The Schuyler national

bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, executed and delivered his note, with the signature of Charles Thrush, Sr., thereon as security, for the sum of $100, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $4.10 as interest on said sum of $100 for said period of four months, and the aforesaid renewal and loan entered into and made a part of the amount to which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

12. That heretofore, to wit, on the 12th day of February, 1890, the defendant George Thrush executed and delivered his note to the said The Schuyler national bank for the sum of $500 in pursuance of a mutual agreement entered into by the defendant George Thrush and the said Schuyler national bank, by the terms of which the said The Schuyler national bank was to lend to the defendant George Thrush the sum of $500 on said day for the period of 90 days from and after said day at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank loaned the defendant George Thrush the said sum of $500 as the sole consideration for the said note, and then the said The Schuyler national bank received and reserved and was paid by the defendant George Thrush the sum of $15.50 as interest thereon for the period of 90 days under the agreement aforesaid, which said loan of $500 enters into and makes a part of the amount to which as collateral security the defendant Sumner holds the aforesaid note and mortgage of $5,000.

13. That thereafter, to wit, on the 13th day of May 1890, upon the expiration of the aforesaid period of 90 days, the aforesaid loan and note was renewed and continued for the period of 90 days by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of 90 days, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, executed and delivered his note, with the signature of Charles Thrush, Sr., thereon as security, for the
50 sum of $500, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $11.50 as interest on said sum of $500 for said period of 90 days, and the aforesaid renewal and loan enters into and makes a part of the amount in which the defendant Sumner holds the said note of $5,000 and mortgage securing the same as collateral security.

14. That heretofore, to wit, on the 24th day of June, 1890, the defendant George Thrush executed and delivered his note to the said The Schuyler national bank for the sum of $112 in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which

the said The Schuyler national bank was to lend the defendant George Thrush the sum of $112 on said date for the period of four months from and after said date, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank loaned the defendant George Thrush the sum of $112 as the sole consideration for said note, and then received, reserved, and was paid by the defendant George Thrush the sum of $4.60 as interest thereon for the period of four months under the agreement aforesaid, which said loan of $112 enters into and makes a part of the amount to which as collateral security the defendant Sumner holds the aforesaid note of $5,000 and mortgage securing the same.

15. That heretofore, to wit, on the 8th day of August, 1890, the said The Schuyler national bank at that time holding the several notes heretofore set forth and their renewals, to wit, being one note for $387.75, bearing date of May 12th, 1890; one note for $160, bearing date of July 3rd, 1890; one note for $100, bearing date of April 29th, 1890; one note of $500, bearing date of May 13th, 1890; one note for $112, bearing date of June 24th, 1890, and also one note by it held from E. L. True for the sum of $176.80 and bearing date of August 2nd, 1890, the said The Schuyler national bank and the defendant George Thrush on said day entered into an agreement whereby the aforesaid usurious loans and notes were all reckoned together with all the usury thereon, and the said The Schuyler national bank loaned said defendant, George Thrush, in addition, the sum of $3,273.29 in cash, and thereby a note of $5,000 was made and all the aforesaid notes merged therein; that on the 8th day of August, 1890, pursuant to the aforesaid agreement, the defendant George Thrush executed and delivered a note for $5,000 to said The Schuyler national bank in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and to continue the aforesaid loans for the period of six months from and after said day, at 12 per cent. interest per annum upon said aggregate sum of $5,000; that in pursuance of said agreement the said The Schuyler national bank loaned to the defendant George Thrush the aforesaid sum of $3,273.29 on said day and added thereto the amounts of usury due upon all the
51 foregoing aforesaid notes, and then the said The Schuyler national bank received, reserved, and was paid by the defendant George Thrush the sum of $305 as interest thereon for the period of six months under the agreement aforesaid, which said loan of $3,273.29 and the aforesaid usurious notes thereto added are the sole and only consideration for the said sum of $5,000 note that day executed and delivered by said defendant, George Thrush, to the said The Schuyler national bank, and the aforesaid loan and usurious transaction and the several renewals thereof are and constitute the amount and loan to which as collateral security the defendant Sumner holds the promissory note of $5,000 and mortgage securing the same.

16. That thereafter, to wit, on the 11th day of February, 1891, upon the expiration of the aforesaid period of six months, the afore-

said loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the aforesaid loan for the period of six months from and after said day, at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued said loan, and the defendant George Thrush, to evidence the same, upon the said day executed and delivered said note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $305 as interest on said sum of $5,000 for said period of six months under the agreement aforesaid, and which said loan and renewal is the same to which the defendant Sumner holds the promissory note of $5,000 and mortgage securing the same as collateral security.

17. That thereafter, to wit, on the 14th day of August, 1891, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the *the* aforesaid loan for the period of six months, at 12 per cent. interest per annum.

That in pursuance of said agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant, to evidence the same, upon said day executed and delivered his note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $305 as interest on said sum of $5,000 for said period of six months under the agreement aforesaid, and which said loan and renewal is the same to which the defendant Sumner holds the promissory note of $5,000 and mortgage securing the same as collateral security.

18. That thereafter, to wit, on the 17th day of February,
52 1892 upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed and continued for the period of 60 days by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of 60 days, at 12 per cent. per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant George Thrush, to evidence the same, upon said day executed and delivered his note for $5,000 to the said The Schuyler national bank, and the

said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $105 as interest on said sum of $5,000 for said period of 60 days under the agreement aforesaid, and which said loan and renewal is the same *of* $5,000 to which the defendant Sumner holds the promissory note and mortgage securing the same as collateral security.

19. That thereafter, to wit, on the 20th day of April, 1892, upon the expiration of the period of 60 days, the aforesaid loan and note was renewed and continued for the period of 60 days by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of an agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of 60 days, at 12 per cent. interest per annum; that in pursuance of the aforesaid agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant George Thrush, to evidence the same, executed and delivered upon said day his note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $105 as interest on said sum of $5,000 for said period of 60 days under the agreement aforesaid, and which loan and renewal *is* the same to which said defendant, Sumner, holds the promissory note and mortgage securing the same as collateral security.

20. That thereafter, to wit, on the 20th day of June, 1892, upon the expiration of the aforesaid period of 60 days, the aforesaid loan and note was renewed and continued for the period of six months by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan for the period of six months, at 12 per cent. interest per annum.

That in pursuance of the aforesaid agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant George Thrush, to evidence the same, executed and delivered upon said day his note for $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank
53 then received, reserved, and was paid by the defendant George Thrush the sum of $311.80 as interest on said sum of $5,000 for said period of six months under the agreement aforesaid, and which loan and renewal is the same to which the defendant Sumner holds the promissory note and mortgage securing the same as collateral security.

21. That thereafter, to wit, on the 22nd day of December, 1892, upon the expiration of the aforesaid period of six months, the aforesaid loan and note was renewed by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of an agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of

which the said The Schuyler national bank was to renew and continue said loan at the rate of 12 per cent. interest per annum, the aforesaid note so given in renewal being made on demand; that in pursuance of said agreement the said The Schuyler national bank renewned and continued said loan, and the defendant, to evidence the same, upon said day executed and delivered his note for the sum of $5,000 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid the sum of $330.33 as interest on said $5,000 from said 22nd day of December, 1892, until the 15th day of July, 1893, at which time the aforesaid note was again renewed and continued by another note being given, and which said note and its renewal are and constitute a part of the same loan to which the defendant Sumner holds a collateral, the $5,000 note and the mortgage securing the same of defendants George Thrush and Mattie N. Thrush set out in his cross-petition.

22. That heretofore, to wit, on the 15th day of July, 1893, the last aforesaid note expired, and the same was again renewed and continued until the 20th day of January, 1894, by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan until the 20th day of January, 1894, at 12 per cent. interest per annum during the time of said note; that there had, prior to said 15th day of July, 1893, two payments been made upon the principle of said note, to wit, March 4th, 1893, the sum of $1,600, and March 1st, 1893, the sum of $400, and the said note on said 15th day of July, in renewal as aforesaid, was made for $3,212.78; that in pursuance of said agreement the said The Schuyler national bank renewed and continued the said loan in the said sum of $3,212.78, and the defendant, to evidence the same, upon said day executed and delivered his note for the sum of $3,212.78, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $201.34 as interest on said sum of $3,212.78 from the 15th day of July, 1893, to the 23rd day of January, 1894, under the agreement aforesaid, and which renewal herein specified is the renewal of the loan to
54 which said defendant, Sumner, holds the said promissory note and mortgage securing the same of the defendant George Thrush and Mattie N. Thrush as collateral security thereto.

23. That heretofore, to wit, on the 23rd day of January, 1894, upon the expiration of the last aforesaid promissory note, the aforesaid loan and note was renewed and continued for the period until April 1st, 1894, by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue the said loan until the 1st day of April, 1894, and during the time of such continuance the said defendant, George Thrush, was to pay 12 per

cent. interest per annum thereof; that in pursuance of said agreement the said The Schuyler national bank renewed and continued the said note and loan, making such renewal note to be of the sum of $3,384.12, and the said George Thrush, to evidence the same, upon said day executed and delivered his note for the said sum of $3,384.12 to the said The Schuyler national bank, and the said The Schuyler national bank then received, reserved, and was paid by the defendant George Thrush the sum of $171.34 as interest on said $3,384.12 for said period, to wit, from January 23rd, 1894, to April 1st, 1894, and the sole consideration of this last renewal note was the said balance of said loan of $3,212.78, and the said loan, being the said note herein, is the loan to which the defendant Sumner holds the promissory note and mortgage securing the same of the defendant- George Thrush and Mattie N. Thrush as collateral security.

24. That thereafter, to wit, on the 31st day of March, 1894, upon the expiration of the last aforesaid note, the aforesaid loan and note was renewed and continued for the period of 180 days from and after said 31st day of March, 1894, by the defendant George Thrush giving a new note of that date to evidence the same under and in pursuance of a mutual agreement entered into by the defendant George Thrush and the said The Schuyler national bank, by the terms of which the said The Schuyler national bank was to renew and continue said loan for the period of 180 days from and after said date at 12 per cent. interest per annum; that in pursuance of said agreement the said The Schuyler national bank renewed and continued the said loan, and the defendant, to evidence the same, upon said 31st day of March, 1894, executed and delivered his note for the sum of $3,229 to the said The Schuyler national bank, which is the note copy of which is set forth in the cross-petition of the defendant Sumner, and then the said The Schuyler national bank received, reserved, and was paid by the defendant George Thrush the sum of $196 as interest on said $3,229 for said period of 180 days under the agreement aforesaid, and the aforesaid renewal was the sole consideration for the said $3,229 note.

And this defendant avers that by the payments made as aforesaid and the usury charged as heretofore specifically set forth that at the time of the execution and coming due of said $3,229 note, copy of which is set out in the cross-petition of the defendant Sumner, there was, by the reason of the payments made thereon of
55 usury, but small amount due as balance on the aforesaid loan evidenced by said note, to wit, the sum not exceeding $—, as the sole and only consideration of the said $3,229 note, and that there was no consideration whatever for the $5,000 note of the defendants George Thrush and Mattie N. Thrush and mortgage securing the same have and except such balance as might be owing upon the aforesaid loan, and the same is held only for such purpose by said defendant, Sumner, and for no other purpose.

That the said note of $5,000 of the defendants George Thrush and Mattie N. Thrush, together with the mortgage securing the same, were not executed and delivered to said William H. Sumner upon

any consideration whatsoever, but the same are simply held by said defendant as collateral security to the amount owing by the defendant George Thrush on the said indebtedness now being evidenced by said $3,229 note, in this, that the said note of $5,000.00 and the mortgage securing the same were executed and delivered by this defendant and George Thrush to said William H. Sumner for the purpose that said Sumner might protect said bank on account of the indebtedness of the defendant George Thrush to said Schuyler national bank, and said note and mortgage were so accepted by said Sumner with the knowledge and consent of said bank; and because said bank refused to take said mortgage and said Sumner in nowise protected said loan or advanced any money thereon and at the time of the maturity thereof, by virtue of the premises, and the payments of usurious and illegal interest made thereon, as aforesaid, there was due and owing, after deducting the payments made upon the principal and the said payments of usurious interest, the small balance, to wit, of $252.20, and for the aforesaid balance the said defendant, Sumner, is entitled to a lien upon said premises under and by virtue of said mortgage and promissory note of $5,000.

And, further answering, this defendant avers that at the time of the execution and delivery of the note and mortgage of $5,000 set forth in the cross-petition of the defendant Sumner this defendant was the lawful wife of the defendant George Thrush, then living, and as such and at the solicitation of her husband joined her husband in the execution of said note and mortgage, and the said note and mortgage did not relate to or in anywise concern her separate trade, property, or estate.

Wherefore this defendant prays that the aforesaid payment of usurious and illegal interest so paid, received, and reserved may be deducted from said principle, and that the said defendant, Sumner, may be found to be entitled to a lien upon the said real estate for the balance after deducting said illegal interest so paid, received, and reserved, as herein specifically aver-ed, and that said defendant be required to pay all his costs in this action.

FRICK & DOLEZAL.
Attorneys for Defendants.

56 STATE OF NEBRASKA, } ss:
Colfax County, }

Mattie N. Thrush, the defendant making the foregoing answer, on her oath deposes and says that she believes the facts stated in the foregoing answer to be true.

MATTIE N. THRUSH.

Subscribed in my presence and sworn to before me this 15 day of December, 1894.

[SEAL.] JNO. F. HOAGLAND,
Notary Public.

On the 7th day of January, 1895, there was filed in the office of the clerk of said court a reply which is in the words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff, *vs.* GEORGE THRUSH, MATTIE THRUSH, The Nebraska State Bank, William H. Sumner, Englebert F. Folda and Martha Folda, Administrators of the Estate of F. Folda, Deceased, Defendants.	Reply of William H. Sumner to George Thrush's Answer to said Sumner's Cross-petition.

And now comes the said William H. Sumner, and for reply to the answer of the defendant George Thrush made to the cross-petition of said William H. Sumner on behalf of the Schuyler National Bank of Schuyler, Nebraska, mentioned in said answer, says:

1. That said Schuyler national bank is a corporation organized and doing business as a national bank under the laws of the United States, and has been a corporation doing business as a national bank ever since the 11th day of April, 1884, and that all the transactions mentioned in said answer had between said Schuyler national bank and said George Thrush were on behalf of said corporation so far as said Schuyler national bank and said William H. Sumner were and are concerned.

2. He further says that the note and mortgage mentioned in said cross-petition and answer were made, executed, and delivered to said William H. Sumner to secure a debt due to said Schuyler national bank upon sums of money principally due to said bank before the execution of said note and mortgage for $5,000; that the indebtedness mentioned in paragraph 3 off said answer, in the sum of $387.75, was originally the debt of one William Thrush, and the interest paid on said indebtedness on or about the 9th day of August, 1889, was paid by William Thrush and not by the defendant George Thrush; that said payment of said interest was made to said
57 Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

3. That the interest payment mentioned in paragraph 4 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

4. That the interest payment mentioned in paragraph 5 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

5. That the interest payment mentioned in paragraph 6 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

6. That the interest payment mentioned in paragraph 7 of said answer was made to said Schuyler national bank more than two

years before the commencement of this action, and the consideration thereof in this action is barred by law.

7. That the interest payment mentioned in paragraph 8 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

8. That the interest payment mentioned in paragraph 9 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

9. That the interest payment mentioned in paragraph 10 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

10. The alleged payment of interest made in paragraph 11 is denied.

11. The interest payment mentioned in paragraph 18 of said answer was not made by said George Thrush nor on his behalf. It was made more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

12. The payment of interest mentioned in paragraph 13 of said answer was not made by said George Thrush nor on his behalf. It was made more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

13. That the interest payment mentioned in paragraph 14 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

14. That the payment of interest mentioned in paragraph 15 of said answer was not in the sum as stated in said answer, but was a much less amount, and was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

15. That the payment of interest mentioned in paragraph
58 16 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

16. That the payment of interest mentioned in paragraph 17 of said answer was not in amount stated in said answer, but for a less amount and was made to said Schuyler national bank more than two years before the commencement of this suit, and the consideration thereof in this action is barred by law.

17. That the interest payment mentioned in paragraph 18 of said answer was made to said Schuyler national — more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

18. That the interest payment mentioned in paragraph 19 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

19. That the interest payment mentioned in paragraph 20 of said answer was not in amount as stated in said answer, but was a less sum, and was made more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

20. That there was no payment whatever at any time of the amount alleged as paid in paragraph 21 of said answer, and there was no contract or agreement as alleged in said paragraph 21 for the payment of 12 per cent. per annum as interest on said debt *ar* any rate of interest in excess of 10 per cent. per annum.

21. That the interest payment mentioned in paragraph 22 of said answer was not at the rate of 12 per cent. per annum, but was at the rate of 10 per cent. per annum and no more, and there was no agreement for any rate of interest exceeding 10 per cent. per annum.

22. That the interest payment mentioned in paragraph 23 of said answer was not at the rate of 12 per cent. per annum, but was at the rate of 10 per cent. per annum and no more, and there was no agreement for any rate of interest exceeding ten per cent. per annum.

23. That the interest payment mentioned in paragraph 24 of said answer was not at the rate of 12 per cent. per annum, but was at the rate of 10 per cent. per annum and no more, and there was no agreement for any rate of interest exceeding 10 per cent. per annum.

24. He, further answering for and on behalf of said Schuyler national bank and himself, denies each and every allegation in said answer contained except such only as are in this reply specifically admitted.

25. He further says that this court has no jurisdiction in this action to consider the question raised in said answer as to each and every item of interest mentioned in said answer as paid to said Schuyler national bank; that said items are not proper items of set-off or counter-claim and cannot be adjudicated except in
59 a suit brought expressly for that purpose under the provisions of section 5198 of the Revised Statutes of the United States.

PHELPS & SABIN,
Attorneys for said William H. Sumner and the said Schuyler National Bank of Schuyler, Nebraska.

STATE OF NEBRASKA, } ss:
Colfax County, }

Charles J. Phelps, being duly sworn, on his oath says that he is one of the attorneys of said Schuyler national bank and of said William H. Sumner, duly authorized in the premises; that said Schuyler national bank is a corporation incorporated under the laws of the Congress of the United States; that said William H. Sumner is a non-resident and is now absent from this State, and that the facts stated in the above and foregoing reply are true as he verily believes.

CHARLES J. PHELPS.

Subscribed in my presence and sworn to before me this — day of January, 1895.

C. O. SABIN,
Notary Public.

[SEAL.]

My commission expires —— —.

On the 7th day of January, 1895, there was filed in the office of the clerk of said court a reply, which is in the words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff, *vs.* GEORGE THRUSH, MATTIE THRUSH, The Nebraska State Bank, William H. Sumner, Englebert F. Folda and Martha Folda, Administrators of the Estate of F. Folda, Deceased, Defendants.	Reply of William H. Sumner to Mattie Thrush's Answer to said Sumner's Cross-petition.

And now comes the said William H. Sumner and for reply to the answer of the defendant Mattie Thrush made to the cross-petition of said William H. Sumner on behalf of the Schuyler National Bank of Schuyler, Nebraska, mentioned in said answer, says:

1. That said Schuyler national bank is a corporation organized and doing business as a national bank under the laws of the United States, and has been a corporation doing business as a national bank ever since the 11th day of April, 1884, and that all the transactions mentioned in said answer, had between said Schuyler national bank and said George Thrush, were on behalf of said corporation so far as said Schuyler national bank and said William H. Sumner were and are concerned.

60 2. He further says that the note and mortgage mentioned in said cross-petition and answer were made, executed, and delivered to said William H. Sumner, to secure a debt due to said Schuyler national bank upon sums of money principally due to said bank before the execution of said note and mortgage for $5,000; that the indebtedness mentioned in paragraph 3 of said answer, in the sum of $387.75, was originally the debt of one William Thrush and the interest paid on said indebtedness on or about the 9th day of August, 1889, was paid by William Thrush and not by the defendant George Thrush; that said payment of said interest was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

3. That the interest payment mentioned in paragraph 4 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

4. That the interest payment mentioned in paragraph 5 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

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9. That the interest payment mentioned in paragraph 10 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

10. The alleged payment of interest made in paragraph 11 is denied.

11. The interest payment mentioned in paragraph 18 of said answer was not made by said George Thrush nor on his behalf. It was made more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

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61 13. That the interest payment mentioned in paragraph 14 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

14. That the payment of interest mentioned in paragraph 15 of said answer was not in the sum as stated in said answer, but was a much less amount, and was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

15. That the payment of interest mentioned in paragraph 16 of said answer was made to said Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

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two years before the commencement of this suit, and the consideration thereof in this action is barred by law.

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19. That the interest payment mentioned in paragraph 20 of said answer was not in amount as stated in said answer, but was a less sum and was made more than two years before the commencement of this action, and the consideration thereof in this action is barred by law.

20. That there was no payment whatever at any time of the amount alleged as paid in paragraph 21 of said answer, and there was no contract or agreement as alleged in said paragraph 21 for the payment of 12 per cent. per annum as interest on said debt, or any rate of interest in excess of 10 per cent. per annum.

21. That the interest payment mentioned in paragraph 22 of said answer was not at the rate of 12 per cent. per annum, but was at the rate of 10 per cent. per annum and no more, and there was no agreement for any rate of interest exceeding 10 per cent. per annum.

22. That the interest payment mentioned in paragraph 23 of said answer was not at the rate of 12 per cent. per annum, but was at the rate of 10 per cent. per annum and no more, and there was no agreement for any rate of interest exceeding 10 per cent. per annum.

23. That the interest payment mentioned in paragraph 24 of said answer was not at the rate of 12 per cent. per annum, but was at the rate of 10 per cent. per annum and no more, and there
62 was no agreement for any rate of interest exceeding 10 per cent. per annum.

24. He, further answering for and on behalf of said Schuyler national bank and himself, denies each and every allegation in said answer contained except such only as are in this reply specifically admitted.

25. He further says that this court has no jurisdiction in this action to consider the question raised in said answer as to each and every item of interest mentioned in said answer as paid to said Schuyler national bank; that said items are not proper items of set-off or counter-claim and cannot be adjudicated except in a suit brought expressly for that purpose under the provisions of section 5198 of the Revised Statutes of the United States.

PHELPS & SABIN,

Attorneys for said William H. Sumner and the said Schuyler National Bank of Schuyler, Nebraska.

STATE OF NEBRASKA, } ss:
Colfax County, }

Charles J. Phelps, being duly sworn, on his oath says that he is one of the attorneys of said Schuyler national bank and of said William H. Sumner, duly authorized in the premises; that said Schuyler national bank is a corporation, incorporated under the laws of the Congress of the United States; that said William H. Sumner is a non-resident and is now absent from this State, and that the facts stated in the above and foregoing reply are true as he verily believes.

CHARLES J. PHELPS.

Subscribed in my presence and sworn to before me this — day of January, 1895.

C. O. SABIN,
[SEAL.] *Notary Public.*

My commission expires —— —.

On the 30th day of March, 1895, a motion was filed in the words and figures following, to wit:

In the District Court of Dodge County.

JAMES GADSDEN }
v.
GEO. THRUSH ET AL. }

And now comes the defendant William H. Sumner and the Schuyler National Bank and move the court to amend the pleading of said William H. Sumner by adding the name of Schuyler National Bank of Schuyler, Nebraska, as a party to this suit and permitting it to file its cross-petition hereto attached.

PHELPS & SABIN,
Att'ys for William H. Sumner and the Schuyler National Bank of Schuyler, Nebraska.

63 And on the 30th day of March, 1895, objections to motion were filed in the words and figures following, to wit:

In the District Court, Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff, }
vs. } Objections.
GEORGE THRUSH ET AL., Defendants. }

Comes now the defendants George Thrush and Mattie N. Thrush and object to the application of the Schuyler national bank for leave to intervene and file cross-petition herein and object to the filing of the answer and cross-petition for the reason that said motion to intervene and said application to intervene and file such answer and

cross-petition was first made after the trial in this action begun and after both the defendant William H. Sumner and these defendants rested and all evidence was introduced upon said issue; all of which more fully appears by the affidavit hereto attached and made a part hereof, marked Exhibit A.

GEORGE THRUSH AND
MATTIE N. THRUSH, *Def'ts*,
By FRICK & DOLEZAL,
Att'ys for Def'ts.

EXHIBIT A.

STATE OF NEBRASKA, } ss:
Dodge County, }

Frank Dolezal, being first duly sworn, on his oath deposes and says that he is one of the attorneys for defendants George Thrush and Mattie N. Thrush and for the plaintiff James Gadsden in this action; that the issue arising between the defendants William H. Sumner and the defendants George Thrush and Mattie N. Thrush was tried and heard and all the evidence introduced thereon and thereunder and defendants and plaintiff rested on said issues, and after such hearing and trial and introduction of evidence and rest of parties the said Schuyler National Bank of Schuyler, Nebraska, then, for the first time, made application for leave to intervent and be permitted to file answer and cross-petition, and filed its motion therefor on the 20th day of March, 1895.

FRANK DOLEZAL.

Subscribed in my presence and sworn to before me this 30th day of March, 1895.

J. M. SHIVELY,
[SEAL.] *Clerk Dist. Court.*

And on the 30th day of March, 1895, the following proceedings were had, to wit:

64 JAMES GADSDEN }
v.
GEORGE THRUSH ET AL. }

On this 30th day of March, 1895, this cause came on for hearing on motion of plaintiff to set aside the rest and to reopen this case and for leave to file an answer to First National Bank of Schuyler, and the court, being fully advised in the premises, doth sustain said motion, to which ruling defendants George Thrush and Mattie N. Thrush except, and plaintiff has leave to file answer instanter, the defendant First National Bank of Schuyler to reply by April 3, 1895. By consent of parties the finding of the court made on March 21st, 1895, that the judgment of Englebert Folda and Margaret Folda, administrators, was not a lien against the land in controversy in this action is hereby set aside. Defendants W. H. Sumner and

Schuyler National Bank withdraw their former motion on file, in writing, and file motion for leave to file a cross-petition instanter; to which motion the defendants Thrush object; which objection is overruled, and Schuyler National Bank has leave to file cross-petition instanter; to which ruling the defendants Thrush except.

And on the 30th day of March, 1895, an answer and cross-petition was filed in the office of the clerk of said court, which is in the words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff,
vs.
GEORGE THRUSH, MATTIE N. THRUSH, NEBRASKA STATE BANK, William H. Sumner, The Schuyler National Bank of Schuyler, Nebraska, Englebert F. Folda and Martha Folda, Administrators of the Estate of F. Folda, Deceased, Defendants.

And now comes The Schuyler National Bank, and for answer and cross-petition herein alleges that it is a corporation duly incorporated under the laws of the United States and — business as a national bank at Schuyler, Nebraska.

2. That on the 8th day of August, 1890, the defendant George Thrush and Charles Thrush, Sr., were indebted to the Schuyler National Bank of Schuyler, Nebraska, in the sum of $5,000, as evidenced by their certain promissory note of that date, payable to the order of said Schuyler national bank six months after the date thereof, with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid.

This defendant further alleges that said note was renewed from time to time until on the 31st day of March, 1894, there remained due and unpaid of said indebtedness to the said Schuyler national bank, as evidence by said $5,000 note of date August 8th, 1890, the sum of $3,229, and on said 31st day of March, 1894, the de-
65 fendant George Thrush executed and delivered to the Schuyler national bank a certain promissory note therefor, which was as follows:

"$3,229. SCHUYLER, NEB., *Mar.* 31, 1894.

One hundred and eighty days after date we or either of us promise to pay to Schuyler national bank or order three thousand two hundred twenty-nine dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of 10 per cent. per annum, payable semi-annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or endorsers hereby consent that time of payments may be extended without notice thereof and waive notice and notice of non-payment.

GEORGE THRUSH."

No part of said note has been paid, and the- is now due thereon from said defendant to said Schuyler national bank the sum of $3,229 and interest, at ten per cent.. from September 27th, 1894.

This defendant further alleges that on the 8th day of August, 1890, to secure said indebtedness of $5,000 then due and owing to the Schuyler national bank, as aforesaid, the defendants George Thrush and Mattie N. Thrush executed and delivered their certain promissory note, of which the following is a true copy:

"$5,000. SCHUYLER, NEB., *Aug.* 8, 1890.

Two years after date we or either of us promise to pay to Wm. H. Sumner or order five thousand dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of 10 per cent. per annum, payable annually, from date until paid; and in case of a suit brought to collect this note I will also pay this plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or indorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
MATTIE N. THRUSH."

To secure the payment of said last-mentioned note the defendants George Thrush and Mattie N. Thrush on said 8th day of August, 1890, executed and delivered their mortgage deed and thereby conveyed to said Wm. H. Sumner the following-described real estate, situated in Dodge county, Nebraska, to wit: The southwest quarter of sec. 19, township 18, range 5; also north half of the southwest quarter of sec. 20, township 18, range 5; also north half of the northwest quarter of sec. 29, township 18, range 5; also southwest quarter of the southwest quarter of sec. 29, township 18, range 5; which deed contained the following conditions: That if the said George
66 Thrush, his heirs, executors, or administrators, shall pay or cause to be paid to the said William H. Sumner, his heirs, executors, administrators, or assigns, said sum of $5,000 on the 8th day of August, 1892, together with interest thereon at ten per cent., payable annually, according to the tenor and effect of the one promissory note of said George Thrush, bearing even date with these presents, then these presents to be void; otherwise to be and remain in full force.

Said mortgage was duly recorded in the office of the recorder of real-estate mortgages for said Dodge county on the 24th day of September, 1890, in Book 2 of Mortgages, on page 145.

This defendant further alleges that the note and mortgage so as aforesaid executed and delivered by the defendants George Thrush and Mattie N. Thrush to William H. Sumner were executed and delivered to William H. Sumner, as trustee, for the use and benefit of said Schuyler national bank, and to secure the indebtedness of said George Thrush to said Schuyler national bank.

That said debt so secured on the 8th day of August, 1890, by

said mortgage deed to Wm. H. Sumner was a debt previously contracted.

That said mortgage to said Wm. H. Sumner was made in good faith and in the name of said Sumner for the use and benefit of said Schuyler national bank.

No proceedings at law have been had for the recovery of the debt secured by said mortgage or any part thereof, and there is now due from the defendants George Thrush and Mattie N. Thrush to this defendant the sum of $3,229 and interest thereon at ten per cent. from September 27th, 1894.

This defendant further alleges that the liens of the Nebraska State Bank, Englebert F. Folda and Martha Folda, administrators of the estate of F. Folda, deceased, and J. C. Noyes and the First national bank, if any, are subject, inferior, and junior to the lien and rights of this defendant.

This answering defendant therefore prays that an account may be taken of the amount due on said note and mortgage; that the priority of liens may be determined, and that the lien and interest of the plaintiff and the defendants The Nebraska State Bank and Englebert F. Folda and Martha Folda, administrators of the estate of Frank Folda, deceased, to J. C. Noyes and the First National Bank of Schuyler, Nebraska, may be adjudged inferior and subject to the lien of this answering defendant, and that said defendants, George Thrush and Mattie N. Thrush, may be foreclosed of all equity of redemption or other interest in said mortgaged premises, and that said premises may be sold according to law, and out of the proceeds thereof the lienholders may be paid the amount adjudged to be due them in the order of their priority, with interest and costs of suit.

And that the defendants George Thrush and Mattie N. Thrush be adjudged to pay any deficiency which may remain after
67 applying the proceeds of said sale to the payments of said debts, and for such other and further relief as may be just and equitable.

PHELPS & SABIN,
Att'ys for Schuyler Nat. Bank, D'f't.

STATE OF NEBRASKA, } ss.:
Dodge County, }

Charles J. Phelps, being first duly sworn, deposes and says that he is one of the attorneys of the defendant The Schuyler National Bank in the above-entiled suit, and that said defendant is a corporation, and that he has read the foregoing answer and cross-petition and knows the contents thereof, and that the facts therein stated are true as he verily believes.

CHARLES J. PHELPS.

Subscribed in my presence and sworn to before me this 20th day of March, 1895.

[SEAL.]

J. M. SHIVELY,
Clerk of D. C.

On the 17th day of August, 1895, an application for leave to amend was filed in the office of the clerk of said court, which is in the words and figures following, to wit:

In the District Court, Dodge County, Nebraska.

JAMES GADSDEN, Plaintiff,
vs.
GEORGE THRUSH ET AL., Defendants.

Come no*t* the defendants George Thrush and Mattie N. Thrush and each for himself and herself asks leave of court to amend the answer to the cross-petition of the defendant William H. Sumner to conform to the facts proved on the trial of this action in this:

Defendant George Thrush asks to amend his said answer by adding thereto on the last page of said answer, in the sixth line, after the word "note," the following: "In this, that the said note of $5,000.00 and the mortgage securing the same were executed and delivered by this defendant and Mattie N. Thrush to said William H. Sumner for the purpose that said Sumner might protect said bank on account of the indebtedness — the defendant George Thrush to said Schuyler national bank, and said note and mortgage were so accepted by said Sumner with the knowledge and consent of said bank, and because said bank refused to take said mortgage and said Sumner in nowise protected said loan or advanced any money thereon."

And the defendant Mattie N. Thrush asks leave to amend her said answer by adding there*in* the same words and figures that said defendant, George Thrush, asks to have added to his answer, as above specified, such additional words and figures to be added on the 18th page of said answer, in line 7th thereof, beginning after the word "note."

68 These defendants further show to the court that by oversight of their attorney the aforesaid words now asked to be added were omitted from said answer and such omission was not discovered until after the close of the evidence and after rest in said hearing; an affidavit of which is hereto attached and made a part hereof.

GEORGE THRUSH,
MATTIE N. THRUSH,
By FRICK & DOLEZAL,
Their Att'ys.

STATE OF NEBRASKA, }
Dodge County, } ss:

Frank Dolezal, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the defendants George Thrush and Mattie N. Thrush, and that he drew the answers of said defendants and of each of them to the cross-petition of defendant William H. Sumner; that said case involves many issues, and the pleadings therein are voluminous; that he had special charge of the

interests of said defendants in said action, and did believe that the said answers contained the words now asked to be added to said answers, and was under such impression and so believed during the taking of the evidence in such action, and for that reason introduced the evidence to prove the condition specified in the words so now asked to be added, and there was no objection made to the introduction of said evidence on the hearing upon the ground that the same was not pleaded in the answers of said defendants; that in the preparation of the brief upon the questions involved in said action affiant believed that said words were in said answers and considered said answers as containing the same; that affiant made an examination of the pleadings on the 16 day of August, 1895, for the reason that said action was to be taken up for disposition on the 17th day of August, 1895, to see that everything was ready and correct, and in examining the said answers, among the other pleadings, discovered for the first time the aforesaid omission.

FRANK DOLEZAL.

Subscribed in my presence and sworn to before me this 16th day of August, 1895.

J. E. FRICK,
Notary Public.

[SEAL.]

And on the 17th day of August, 1895, the following proceedings were had, to wit:

JAMES GADSDEN
vs.
GEORGE THRUSH ET AL.

On this 17th day of August, 1895, this cause came on for hearing on motion of plaintiff for leave to file an answer to cross-petition of First National Bank of Schuyler, Nebraska; to which motion said defendant, First National Bank, objects, and the court, be-
69 & 70 ing fully advised in the premises, does overrule said objection and said motion is sustained; to which ruling of the court said First National Bank excepts, and leave is given plaintiff to file an answer to cross-petition instanter, said First National Bank to reply as of this date, and this cause came on for hearing on motion of defendants for leave to file amended answer for George and Mattie N. Thrush to cross-petition of Wm. H. Sumner; to which motion said Wm. H. Sumner objects, and the court, being fully advised in the premises, does overrule said objections; to which ruling of the court the said Wm. H. Sumner excepts, and said motion is sustained; to which ruling of the court said Wm. H. Sumner excepts, and Wm. H. Sumner has leave to reply as of this date.

* * * * * * *

71 On the 31st day of August, 1895, the following proceedings were had, to wit:

JAMES GADSDEN, Plaintiff,
vs.
GEORGE THRUSH, CHARLES THRUSH, SR., MATTIE N. Thrush, Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased; J. C. Noyes, William H. Sumner, and The Nebraska State Bank of Schuyler, Nebraska; The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, Defendants. } Decree.

Now, on the 31st day of August, 1895, this cause came on to be heard and tried to the court upon the cross-petition of the defendant First National Bank of Schuyler, Nebraska, filed by leave of court; upon the answer and cross-petition of the defendant State Bank of Schuyler, Nebraska, and the answer thereto of the defendants George Thrush and Mattie N. Thrush, and the reply to said answer; upon the answer and cross-petition of William H. Sumner and the amendment thereto, by leave of court, of the answer and cross-petition of the defendant The Schuyler National Bank which was incorporated therewith, and the answer of defendants George Thrush and Mattie N. Thrush thereto; upon the answer and cross-petition of Englebert Folda and Margeret Folda, administrators of the estate of Frank Folda, deceased, and the answers of George Thrush and Mattie N. Thrush thereto; upon the answer of the plaintiff to the cross-petition of the defendant First National Bank of Schuyler, Nebraska, and upon the reply and several pleadings to the aforesaid answers and cross-petitions and upon the evidence, and was submitted thereon to the court; on consideration of which the court, being duly advised in the premises, does find:

1st. That the said defendants, George Thrush and Mattie N. Thrush, executed and delivered to the defendant The First National Bank of Schuyler, Nebraska, the promissory note and mortgage securing the same set forth in the answer and cross-petition of said defendant, and said mortgage was duly recorded in the records of said Dodge county at the time set forth in said cross-petition, and that there is now due and payable thereon from the defendant George Thrush to said defendant, First National Bank, the sum of $3,627.36, with interest from the 17th day of August, 1895, and the same is a first lien upon the southwest quarter of section twenty (20), in
72 township eighteen (18), range five (5), in Dodge county, Nebraska, and the north half of the northwest quarter and the southwest quarter of the southwest quarter of section twenty-nine (29), in township and range aforesaid, and the said defendant, First National Bank, is entitled to a foreclosure of said lien, and the aforesaid amount so found due bears interest at 10 per cent. per annum from the date hereof; to which findings of the court and each of them the plaintiff excepts, and to which findings the defendants George Thrush and Mattie N. Thrush severally except.

2nd. That the defendant George Thrush and Mattie N. Thrush executed and delivered the promissory note and mortgage securing the same set forth in the answer and cross-petition of the defendant

William H. Sumner; that the same was executed and delivered for the benefit of the defendant The Schuyler National Bank and the defendant Schuyler National Bank is entitled to the proceeds and avails of said promissory note and mortgage; that the said promissory note and mortgage was recorded, as alleged in the cross-petition of said defendant, William H. Sumner, and that the same is tainted with usury, and there is now due and payable thereon from the defendant George Thrush the sum of $3,000.00, the same being the amount due and payable upon the note of $3,229.00 set out in the cross-petition of said defendant, William H. Sumner, said sum of $229.00 of the said $3,229.00 being usury; that the said defendant, William H. Sumner, and Schuyler national bank to and for the use and benefit of said Schuyler national bank are entitled to the foreclosure of said mortgage; that said defendants are not to recover costs in this action nor any interest upon the aforesaid sum found due, and the same is a second lien subject only to the lien of the defendant First National Bank of Schuyler, as herein found, upon the north half of the southwest quarter of section 20, in township 18, range 5, in said Dodge county, and upon the north half of the northwest quarter and the southwest quarter of the southwest quarter of section twenty-nine, in township and range aforesaid; to which finding of the court fixing the sum of $3,000.00 to be due and payable upon said mortgage and $5,000.00 note secured and finding the same to be lien upon said premises the defendants George Thrush and Mattie N. Thrush severally excepted.

3rd. The court finds that the defendants George Thrush and Mattie N. Thrush executed and delivered to the defendant Nebraska State Bank of Schuyler, Nebraska, the promissory note of $4,000.00 and mortgage securing the same, set forth in the answer and cross-petition of said defendant; that the same was given to secure a note of $4,300.00 set forth in the answer and cross-petition of said defendant, Nebraska State Bank, and that the said mortgage and the note secured thereby were given as collateral to said $4.300.00 note, which said note evidenced a usurious loan, and there is now due and payable to the defendant Nebraska State Bank upon said mortgage and the note secured thereby, after deducting therefrom the usury paid upon the said principal note, the sum of $1,965.42, which sum
73 shall bear no interest and the said defendant, Nebraska State Bank, shall recover no costs herein, and the said defendant, Nebraska State Bank, is entitled to a foreclosure of said mortgage to satisfy said sum of $1,965.42, and the same is a second lien upon the south half of the southwest quarter of said section 20, and a third lien upon the balance of said premises; to which finding of the court specifying the said sum of $1,965.42 to be due and payable on said mortgage to be a lien upon said premises the defendants George Thrush and Mattie N. Thrush severally excepted.

4th. The court finds that the defendants George Thrush and Mattie N. Thrush executed and delivered to the plaintiff the promissory note and mortgage securing the same set out in plaintiff's petition, and there is now due and payable to the plaintiff from said defendants the sum of $1,382.69, with interest from Au-

gust 17, 1895, and the said mortgage is a third lien upon the said south half of the southwest quarter of said section 20 and a fourth lien upon the balance of said premises, and that the same is entitled to bear interest at the rate of 10 per cent. per annum upon the amount found due as aforesaid, and the plaintiff is entitled to a foreclosure of his said mortgage to satisfy the sum so found due as aforesaid, with interest, and is entitled to recover costs.

5th. Upon the issues joined upon the answer and cross-petition of the defendants Englebert Folda and Margaret Folda, as administratrix of the estate of Frank Folda, deceased, the court finds in favor of the plaintiff and in favor of all the said other defendants and against said defendants, Englebert Folda and Margaret Folda, as administrators of the estate of Frank Folda, deceased.

6th. That the defendant Mattie N. Thrush is the owner at the present time of said premises, subject to the liens found as aforesaid, and the legal title in and to said premises is in the said defendant, Mattie N. Thrush.

7th. That the following part of said premises, to wit, —, is and constitutes the homestead of the defendants Mattie N. Thrush and George Thrush, said defendants being husband and wife and occupying said premises with their family as a homestead.

It is therefore considered, adjudged, and decreed by the court that the said defendant, George Thrush, within 20 days from this day pay to the defendant The First National Bank of Schuyler, Nebraska, the sum of $3,627.36, with interest as herein found; to the defendants William H. Sumner and Schuyler National Bank the sum of $3,000.00, without interest and without costs; to the defendant The Nebraska State Bank the sum of $1,965.42, without interest and without costs, and to the plaintiff the sum of $1,382.69, with interest from this day at 10 per cent. per annum and costs of suit, and that in default of such payments or any of them the said premises, to wit, the southwest quarter of section 20, in township 18, range 5, in said Dodge county, and the north half of the northwest quarter and the southwest quarter of the southwest quarter, in township and range aforesaid, may be sold and the proceeds thereof
74 applied to the payment of said several liens in order of priority as hereinbefore found; that in such sale the north half of the southwest quarter of said section 20 may be sold separately from the south half of the southwest quarter of said section 20; that the said defendants and each of them be, and they are hereby, barred and foreclosed of all right, title, interest, lien, and equity of redemption in and to said premises and every part thereof and that process issue upon the confirmation of said sale, directing the sheriff of said Dodge county to put the purchaser at such sale in possession of said premises; that this decree shall draw interest from this date upon the amount found due the plaintiff and the defendant First National Bank of Schuyler at the rate of 10 per cent. per annum, and that said plaintiff and the defendant First National Bank of Schuyler each recover his and its costs in this action, and that the defendants Nebraska State Bank and Schuyler

National Bank pay their costs in this action; to which decree and all of said findings the plaintiff and the defendants George Thrush and Mattie N. Thrush severally excepted. It is further ordered that the plaintiff and the defendant George Thrush and Mattie N. Thrush have forty days in which to prepare and serve their exceptions.

Supersedeas bond for defendants Thrush fixed by the court at the sum of $1,000.00, and supersedeas bond for plaintiff fixed by the court at the sum of $1,500.00.

On the 9th day of September, 1895, a bond was filed in the office of the clerk of said court, which is in the words and figures following, to wit:

Know all men by these presents: That we, George Thrush and Mattie N. Thrush, as principals, and Thomas Porter and Edward Hughs as sureties, are held and firmly bound unto William H. Sumner and the Schuyler National Bank of Schuyler, Nebraska, in the penal sum of one thousand dollars ($1,000.00) for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents

The condition of this obligation is such, that whereas in an action pending on the district court of Dodge county, Nebraska, wherein James Gadsden is plaintiff and the above-bounden George Thrush and Mattie N. Thrush together with Charles Thrush, Sr., Englebert Folda and Margeret Folda as administrators of the estate of Frank Folda, deceased, J. C. Noyes, William H. Sumner, Nebraska State Bank of Schuyler, Nebraska, The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, are defendants, a judgment and decree was rendered in said action whereby among other things it was considered, adjudged and decreed that there was due the defendants, William H. Sumner and The Schuyler National Bank to and for the benefit of said bank the sum of $3,000.00 and the premises described in the petition of said action were ordered sold to satisfy the aforesaid sum so found due and,

75 Whereas, the said George Thrush and Mattie N. Thrush intend to appeal from the aforesaid finding, order and decree to the supreme court of the State of Nebraska and upon application in their behalf made, the said district court has fixed the amount of the bond to be given to supercede and stay the aforesaid decree on the part of said George Thrush and Mattie N. Thrush in the sum of one thousand dollars to be given by said defendants.

Now therefore if the above-bounden George Thrush and Mattie N. Thrush will prosecute their said appeal without delay and will not during the pendency of such appeal commit or suffer to be committed any waste upon the real estate so ordered to be sold in said

action, then and in such event this bond to be null and void, otherwise to be and remain in full force and effect.

Dated this 9th day of September, 1895.

GEORGE THRUSH.
MATTIE N. THRUSH.
THOMAS PORTER.
EDWARD HUGHS.

This bond, with the sureties therein, is hereby approved by me this 9th day of September, 1895.

J. M. SHIVELY,
Clerk District Court.

[SEAL.]

On the 12th day of September, 1895, there was filed in the office of the clerk of said court a bond which is in the words and figures following, to wit:

Know all men by these presents: That we, James Gadsden, as principal, and E. F. Kenney and —— —— as sureties, are held and firmly bound unto the First National Bank of Schuyler, Nebraska, in the penal sum of fifteen hundred dollars ($1,500.00) for the payment of which well and truly to be made we bind ourselves, our heirs, executors administrators and assigns, jointly and severally firmly by these presents.

The condition of this obligation is such that, whereas in an action pending in the district court of Dodge county, Nebraska, wherein the above-bounden James Gadsden is plaintiff, and George Thrush, Mattie N. Thrush, Charles Thrush, Sr., Englebert Folda and Margeret Folda, as administrators of the estate of Frank Folda, deceased; J. C. Noyes, William H. Sumner, Nebraska State Bank of Schuyler, Nebraska, Schuyler National Bank of Schuyler, Nebraska, and The First National Bank of Schuyler, Nebraska, are defendants, a decree was rendered by which it was found, considered and decreed that the said First National Bank of Schuyler, Nebraska, had a first and senior lien to the amount of $3,627.36, with interest, on the premises in said action were ordered to be sold and the proceeds applied to the payment of said lien, and the lien of this plaintiff upon said premises was subordinated and subjected to the aforesaid lien so found in favor of said defendant, The First National Bank of Schuyler, Nebraska, and

76 Whereas, this plaintiff intends to appeal from the aforesaid finding, order, and decree, and on application by him made in that behalf the said district court has fixed the amount of the bond to be given by plaintiff to supercede said order and decree at the sum of $1,500.00.

Now therefore if the above-bounden James Gadsden will prosecute such appeal without delay and will not, during the pendency of such appeal, commit or suffer to be committed any waste upon the aforesaid real estate so ordered to be sold, then in such event

this bond to be null and void, otherwise to be and remain in full force and effect.

Dated this 7th day of September, 1895.

JAMES GADSDEN.
E. F. KENNY.

This bond, with the sureties therein, is hereby approved by me this 12th day of September, 1895.

J. M. SHIVELY,
Clerk District Court.

[SEAL.]

STATE OF NEBRASKA, } ss.:
Dodge County, }

I, J. M. Shively, clerk of the district court within and for said county, do hereby certify that the above and foregoing is the original bill of exceptions in the within cause, and a true and perfect transcript of the petition, answer, and cross-petition of J. C. Noyes, answer of Mattie N. Thrush to the cross-petition of J. C. Noyes, answer and cross-petition of defendants George Thrush and Mattie N. Thrush, answer and cross-petition of First National Bank, answer of plaintiff to cross-petition of defendant First National Bank of Schuyler, reply of First National Bank of Schuyler, Nebraska, answer and cross-petition of Wm. H. Sumner, answers of defendants George Thrush and Mattie N. Thrush to cross-petition of William H. Sumner, replies of William H. Sumner to answer of defendants George Thrush and Mattie N. Thrush, motion to amend pleadings of William H. Sumner, objections thereto by defendants George Thrush and Mattie N. Thrush, answer and cross-petition of Schuyler National Bank, application of defendants George Thrush and Mattie N. Thrush to amend the answer and cross-petition of defendant William H. Sumner, answer of plaintiff to cross-petition of defendant First National Bank of Schuyler, Nebraska, decree, supersedeas bonds, and court proceedings, as the same appear on file and of record of the records of my office.

Witness my hand and the seal of said court, at Fremont, this 17th day of February, 1896.

J. M. SHIVELY,
Clerk of the District Court.

Cost of transcript, $26.50.

[SEAL.]

77 (Endorsed:) 8315. James Gadsden, appellant, *vs.* George Thrush *et al.*, appellees, Transcript of record. Supreme court of Nebraska. Filed Feb. 21, 1896. D. A. Campbell, clerk, (and)

(Endorsed:) 12533. Gadsden *v.* Thrush. Transcript supreme court of Nebraska. Filed Jan. 22, 1902. Lee Herdman, clerk.

And that on the same day, to-wit, on the 22nd day of January, 1902, there was filed in the office of the clerk of said supreme court a bill of exceptions in words and figures following, to-wit:

78 In the District Court of Dodge County, Nebraska.

JAMES GADSDEN
vs.
GEORGE THRUSH.

Bill of Exceptions.

Be it remembered that on the trial of this cause in the district court of Dodge county, Nebraska, before William Marshall, judge of said court, at the January (adjourned), 1895, term thereof, to wit, on the 19th, 20th, and 21st days of March, 1895, the following evidence and testimony was introduced and given to the court by the plaintiff and in his behalf and by the defendant and in his behalf, together with the objecti-ns of the said parties to the introduction thereof, the rulings of the court thereon, and the exceptions of the said parties thereto, by them respectively noted as hereinafter sat forth.

Messrs. Frick & Dolezal appearing for the plaintiff and for defendants George Thrush and Mattie N. Thrush, and M. Zentmeyer, Grimison & Thomas, and C. J. Phelps for defendant.

J. S. JOHNSON, called by defendant, sworn, testifies as follows:

(Examined by Mr. PHELPS:)

1 Q. What relation do you bear to the Schuyler National Bank of Schuyler, Nebraska?

A. Cashier.

2 Q. How long have you been cashier of that bank?

A. Nearly six years.

3 Q. What kind of a corporation is that?

A. Incorporated under the national banking act.

4 Q. How long has it been doing business as an incorporated national bank under the law of Congress regulating that matter?

A. Why, I think it is—I don't recollect the exact date, but it is either eight or nine years; something like that.

5 Q. Before the inception of this transaction?

A. Yes.

6 Q. Calling your attention to paper No. 1, I will ask you if you remember the time that was executed.

A. Yes.

7 Q. Who executed it?

A. George and Mattie Thrush.

8 Q. At the time were you the cashier of the Schuyler national bank?

A. I was.

(PHELPS:) We offer this in evidence.
(Marked Exhibit 1.)

79 9 Q. Calling your attention to paper No. 2, I will ask you if *if* you remember the execution of that paper.
A. I do.
10 Q. By whom was that executed?
A. By George and Mattie Thrush.
11 Q. These two papers, Exhibits No. 1 and paper No. 2, bear their signatures?
A. Yes.
12 Q. You saw them execute it?
A. Yes.

(PHELPS:) We offer paper No. 2 in evidence.
(DOLEZAL:) I would like to ask a question on *voire dire* as to this instrument offered in evidence, No. 2.

13 Q. The notary's name signed here—J. Sherborne Johnson—who was the notary?
A. Myself.
14 Q. You, yourself?
A. Yes.
15 Q. And at the time of the making of that acknowledgement, taking of that purported acknowledgement, was you the cashier of The Schuyler National Bank, the defendant here?
A. I was.

Plaintiff objects to the paper as immaterial, irrelevant, incompetant, for the further reason that it does not show that it was executed and acknowledged.

(DOLEZAL:)

16 Q. During that time were you and are you — a stockholder in the bank?
A. Yes.
17 Q. In the Schuyler national bank?
A. Yes.

Plaintiff objects because the instrument is incompetent, immaterial, irrelevant, and because the person before whom it purports to be acknowledged was not competent to take acknowledgements, being a party in interest.
The same objection as last above is made on the part of the plaintiff Gadsden. Overruled. Exception. (Marked Exhibit 2.)

18 Q. At the time of the execution of the note and mortgage in evidence, what debt, if any, was due — defendant George Thrush to the Schuyler national bank?

Objected to—immaterial, irrelevant, incompetent, asking for a conclusion and asking for transactions between parties not parties to the record, not parties to this suit. Overruled. Exception.

A. Oh, I don't remember the exact amounts, but it must have been somewheres, $1,600 to $1,800.

19 Q. Does the note represent any indebtedness that day contracted by the defendant George Thrush?

A. Yes, sir.

20 Q. And Maggie Thrush, in addition to the antecedent debt of $1,600 or $1,800?

Objected to for the same reasons last above. Overruled. Exception.

A. Yes, sir.

21 Q. In all what was the amount of the indebtedness secured by that mortgage?

Plaintiff objects—incompetent, immaterial, irrelevant, no sufficient foundation laid, not the best evidence. Sustained.

22 Q. Do you know the amount of the indebtedness, including the antecedent debt of $1,600 or $1,800, and the money, if any, they had loaned to George Thrush?

A. I do.

23 Q. What was the total amount?

Plaintiff objects—not the best evidence. Overruled.

A. $5,000.

24 Q. To whom was this $5,000 owing by the defendant George Thrush?

A. To the Schuyler national bank.

25 Q. To secure what indebtedness was this mortgage made, executed, and delivered?

Plaintiff objects as asking for a conclusion, and not the best evidence, and no foundation laid. Overruled. Exception.

A. Given as collateral to the note loaned by the Schuyler national bank.

26 Q. To whom?

A. To George Thrush.

27 Q. Now, this note and mortgage in evidence, marked Exhibits No. 1 and 2, I understand you, was collateral to the debt of $5,000 then owing to the Schuyler national bank. I will now ask you if another note of that same date was also executed by George Thrush and another, and being another security for the same debt.

A. Yes.

Plaintiff objects as leading, asking for a conclusion, and no sufficient foundation laid. Sustained.

28 Q. What other evidence of the same debt, if any, was on the same day taken?

A. There was another note of the same amount—a chattel-mortgage security.

29 Q. I will ask you to examine and ask you to state wheather at is the one that you refer-ed to.

A. Yes.

(PHELPS:) We offer paper No. 3 in evidence.
(Marked Exhibit 3.)

81 30 Q. Now, I will ask you to state wheather there was any other debt secured than this total amount by the mortgage in evidence.

A. No, sir.

31 Q. I will ask you to state whether the defendant was indebted in any way to William Sumner upon any other account or contract.

Plaintiff objects—no sufficient foundation laid. Sustained.

32 Q. Do you know wheather the defendant was indebted to William H. Sumner?

A. I do.

33 Q. Was he?

A. No, sir.

34 Q. To whom were those notes in evidence and the mortgage in evidence delivered?

Plaintiff objects—incompetent, immeterial, irrelevant, no sufficient foundation laid, and tending to contradict the writing itself. Overruled. Exception.

A. To the Schuyler national bank.

35 Q. Who has had possession from that time to this of these two notes and this mortgage?

Plaintiff objects—incompetent, immaterial, irrelevant, no foundation laid. Overruled. Exception.

A. Schuyler national bank.

36 Q. Have payments of this indebtedness been made from time to time since the execution of these notes and this mortgage?

A. Yes, sir.

37 Q. Do you know the amount due and unpaid, what it was on the 31st day of March, 1894?

A. Yes; I could tell.

38 Q. You could tell from memory, or would you have to consult any memorandum?

A. Well, of course, I remember in looking it up.

39 Q. What was the amount due and unpaid on the 31st day of March, 1894?

A. After that payment was made on that day, $3,229, and interest was paid in advance for 180 days, I believe 183 days.

40 Q. Now, this was last March a year ago?

A. Last March a year ago.

41 Q. At the end of this 180 days was there any interest or any principal sum of $3,229 paid?

A. No, sir.

42 Q. Has there ever been since then any interest?

A. No, sir.

43 Q. What remains due at this time and unpaid upon that original indebtedness of $5,000?

A. $3,229 and interest from maturity.
44 Q. From 180 days after?
A. 183 days after—March 31, 1894.
82 45 Q. Due to who?
A. Schuyler national bank.
46 Q. Have you that $3,229 note with you?
A. No, sir.
47 Q. Do you know where it is?
A. Yes.
48 Q. Where?
A. Schuyler national bank. You have a copy of it. The original note was there in the bank.

(PHELPS:) We will offer this in evidence—paper 4.
(Marked Exhibit 4.) (Original note to be substituted.)

49 Q. Has any part of this indebtedness evidence- by this note, of which a copy is in evidence, marked Exhibit No. 4, been paid?
A. No, sir.
50 Q. Had William H. Sumner, independent of the bank, any personal interest in this note and debt secured?
A. No, sir.
51 Q. Was William Sumner present at the time this note and mortgage was executed and delivered to the Schuyler national bank?
A. No, sir.
52 Q. What was said by and between George Thrush and you, as cashier of the Schuyler national bank, with reference to this indebtedness and the execution of this collateral note and mortgage, if you remember?
A. Why, the substance of it was that it should be held as collateral for whatever he owed us or might owe us—might owe the company.
53 Q. But you spoke of the bank. Do you mean the bank?
A. Yes; what he owed or might owe the bank.
54 Q. What was said, if anything, between Thrush and yourself with reference to who should be named as mortgagee in the mortgage?
A. I don't remember. I know Mr. Sumner was suggested as a suitable person, and we made it to him accordingly. He was satisfactory to the bank and to Mr. Thrush, too.
55 Q. What relation did William Sumner bear to that bank at that time?

Plaintiff objects—incompetent, immaterial, irrelevant. Overruled. Exception.

A. President.
56 Q. What relation has he borne to that bank from that time to this time?

Same objection last above, same ruling.

A. President.

57 Q. What relation does he now hold to that bank?
A. President.

83 Cross-examination.

(By Mr. DOLEZAL:)

58 Q. Now, then, was the word "collateral" written on this $5,000 note, Exhibit 1?
A. Why, I think it was written right after it was signed; right at the time.
59 Q. Is the note in your handwriting—the body of it?
A. Yes.
60 Q. Do you say that the word "collateral" is in the same handwriting as the body of that note?
A. I do; I wrote it myself.
61 Q. You wrote it yourself?
A. Yes.
62 Q. What was this to be collateral (to)?
A. Collateral to what George Thrush owed the Schuyler national bank.
63 Q. Then the bank held a principal note itself for what he owed to it?
A. Yes.
64 Q. Now, this note, Exhibit 3, is the principal note that was given to the bank?
A. Yes, sir.
65 Q. What is the sign on that note, under the big letter D?
A. C. M.—chattel mortgage.
66 Q. This was the principal note made direct to the bank?
A. Yes.
67 Q. Now, who drew that note, Exhibit 3?
A. I did.
68 Q. Is your handwriting the body of that note?
A. Yes.
69 Q. So far as its being written?
A. Excepting the signatures, of course.
70 Q. What does the letter D signify, stamped upon there?
A. That is more than I can tell you; that was not put on by the Schuyler national bank; that note was sent and rediscounted.
71 Q. Is it not a fact that this exhibit was delivered for Mr. Sumner?
A. As collateral to this loan.
72 Q. It was delivered for Mr. Sumner because Mr. Thrush was owing the bank?
A. Yes; was to be held right in the bank, placed among the collateral papers to Mr. Thrush at the time.
73 Q. Isn't this a fact: Didn't you state to Mr. Thrush that this note, Exhibit 1, and the mortgage securing it were to be made to Mr. Sumner and not to the bank?
A. Well, to be made as collateral.

74 Q. No, sir; my question—it was mutually agreed upon to be made in the name of Sumner?

A. Why, that agreement is not complete when you say that.

84 75 Q. Isn't it a fact that this note, Exhibit 1, and the mortgage securing it was to be made to Mr. Sumner and not to the bank?

Defendants object—improper cross-examination.

A. Why, as a collateral it was.

76 Q. I don't want conclusions.

A. That is a fact; it was given to Mr. Sumner as collateral to the bank, and I can't change it to suit you.

77 Q. There is a straight fact you can answer; I will ask for that repeated.

(Question repeated.)

A. Well, I could only repeat my former answer, because that was it; it wasn't to be executed to Mr. Sumner personally; it wasn't the fact. The loan was based on the security represented there, the loan in the bank; without that security he would not have secured the money.

Plaintiff move- to strike that out as not responsive. Sustained.

(COURT:) The last part of it may be stricken out.

A. As a matter of fact it was just as I have stated.

78 Q. Why didn't you make that direct to the bank?

Defendant- objects to asking for a reason. Overruled.

A. Well, we had no reason excepting that it was a little better to handle, place collateral, so it could be placed away.

79 Q. Was it or was it not done pursuant to instructions of Mr. Sumner that he wanted a note of $5,000 and a mortgage securing it?

A. It was not.

80 Q. Did you not so state to Mr. Thrush at the time of his signing the note, Exhibit 1, and the mortgage securing it that that was to be given; that that note and mortgage was to be given to Mr. Sumner directly?

A. No, sir.

81 Q. You remember that distinctly?

A. Why, Mr. Sumner did not know about the transaction until afterwards.

82 Q. You say that you did not so state to Mr. Thrush?

A. I don't remember of stateing like it.

83 Q. You say you took also a chattel-mortgage security on this note, Exhibit No. 3?

Defendant- objects—improper cross-examination, based upon a statement of facts assumed and not in evidence.

A. I think so.

84 Q. That chattel mortgage went direct to the bank, didn't it?
A. I think so.
85 Q. And that mortgage was a direct security for this sum of $5,000 evidenced by this principal note, Exhibit No. 3?

85 Defendants object—improper cross-examination. Overruled. Exception.

86 —. ——.
Q. Yes, sir.

Defendants ask that that be stricken out as incompetent, immaterial, improper cross-examination. Overruled. Exception.

87 Q. You may now state to me the payments upon that principal note of $5,000 and other debts, being Exhibit No. 3.

Defendants object—improper cross-examination. Overruled.

A. You mean the payments of——
88 Q. All the payments made on it; give me them in detail; what was paid on it?
A. Does that refer to any more than that note right there?
89 Q. It refers to what was paid on that note.
A. On this note (indicating Exhibit 3)?
90 Q. Yes.
A. The payments were on other notes than this—that is, on renewal.
91 Q. Has that original note been paid?
A. No, sir.
92 Q. Well, what has been paid on it?
A. On March 3, 1893, there was $2,000 paid.
93 Q. Now, what other payments?
A. If you want the interest payments running right through—the amount of interest.
94 Q. I want all payments upon that note.
A. Well, at the time that note was given the interest was paid in advance for six months.
95 Q. Was that deducted out of the $5,000?
A. That was taken out of the $5,000. It was taken out of the ad-itional amount loaned.

(PHELPS:)

96 Q. What was the date?
A. Aug. 8, 1890.
97 Q. $2,000 paid March 3, 1893. Do I understand you to say that that is true?
A. Yes.
98 Q. Now, how was that payment made—in what?
A. It was a partial payment—a loan; same loan that was laid under this mortgage.
99 Q. Now, was this amount evidenced by any notes—this amount of $2,000?

A. It was paid on this note; this note was renewed, and the original note carried along and reduced to $3,229.

100 Q. You may look at this paper 5—two notes—and answer wheather or not that is evidenced by the payment of $2,000.

A. Why, these notes were taken.

86 Defendants object—improper cross-examination, immaterial, irrelevant. Overruled. Exception.

101 Q. These were notes evidencing the credit of $2,000, were they not?

A. Why, we took those notes and gave George Thrush $2,000 for them.

102 Q. You mean you bought them of him?

A. I may be wrong on that year of 1893.

103 Q. That memorandum that you are refer-ing to, when did you make that memorandum?

A. It was March 3, 1893. This note we bought and the other note was held until it was paid.

104 Q. You bought that note; from whom did you buy that note?

Defendants object—immaterial, improper cross-examination. Sustained.

105 Q. Is the name William H. S-mner endorsed on there the signature of Will. Sumner?

A. Yes.

Defendant- objects—immaterial.

106 Q. The signature on back of paper 5, W. H. Sumner, "J. S. J.," is that the signature of Mr. Sumner?

A. No, sir.

107 Q. Did you write that?

A. Yes.

108 Q. Did you have authority to sign his name?

A. The paper was practically ours.

109 Q. Why didn't you sign that the same on the other paper, $400?

A. Because he came around before we took it from Mr. Thrush. We took Mr. Thrush in March; you see we did not take it until March; it was given in August, but not due until March, 1894.

110 Q. Given in August, 1892?

A. August, 1892.

111 Q. Now, why diden't you credit the payments that were made from time to time on this Exhibit No. 3?

Defendants object—improper cross-examination. Overruled. Exception.

A. Why, that is simply an oversight, that the payment is not credited on there—that is, it was laid away and never—for my part it was an oversight, although I am not sure but Mr. Thrush requested that it be not endorsed; I am not sure about that.

112 Q. Now, you say that this note, Exhibit No. 3, was given at

that time; how much money was loaned by the bank on that principal note?

A. Why, there was the difference between what he owed us and $5,000.

Defendants object as immaterial.

87 113 Q. Now, what was that—what were those figures, do you know?

A. Why, the amount that Mr. Thrush got was $3,273.29.

114 Q. And how much did he owe the bank?

A. ——.

115 Q. Just one question. When did you make that memorandum there from which you are figuring?

A. Yesterday.

116 Q. Not made at or about the time that the transactions took place?

A. No, sir.

117 Q. And that is the memoranda from which you have been answering me these figures?

A. Yes.

Plaintiff objects to the use by the witness of that memoranda.

A. I can refer right to the books if preferable.

Objection sustained.

118 Q. What day was this $3,273.29 money boaned to Mr. Thrush?

A. Aug. 8.

119 Q. 1889?

A. 1890.

120 Q. What amount did he owe to the bank and on what?

A. Why, there were various notes made by the defendant.

121 Q. Well, give me the amounts of the notes.

A. $1,436.55 I think they figured up. I think that is right.

122 Q. Now, what was the difference made up that went to the $5,000?

A. The difference was interest.

123 Q. How much interest was there?

A. $290.16.

124 Q. For what period of time?

Defendants object—immaterial, improper cross-examination. Overruled. Exception.

A. For six months and three days.

125 Q. And what rate?

Defendants object—immaterial, irrelevant, incompetent, improper cross-examination, seeking to introduce the defence in cross-examination. Overruled. Exception.

A. Well, the rate of interest at the time. A person can figure that. A person can figure for himself the rate of interest.

126 Q. Was there any agreement as to the rate of interest?

Defendants object—incompetent, immaterial, improper cross-examination. Overruled. Exception.

A. The agreement was 12 per cent., but this isen't 12 per cent.

127 Q. It was 12% per annum, was it?

A. That was the agreement.

88 128 Q. You don't know but some other amounts may have been in?

A. That figures up exactly $5,000.

129 Q. You don't know but what there was a small payment of money made at that time?

A. There was no money paid at that time.

130 Q. How do you know?

A. From memory and from the books.

131 Q. Were those other notes that were owing due at that time?

A. They were not all due.

132 Q. Do you know wheather any deductions was made on that ground?

Defendants object—incompetant, immeterial, improper cross-examination.

A. Why, it is usual with us to make allowances.

133 Q. Now, these notes that were due, were they notes payable to the bank, all of them that constituted this $1,600?

A. Why, they were either payable to the bank or bought by the bank.

134 Q. Either payable to the bank or bought by the bank?

A. They belonged to the bank at that time.

135 Q. Was this paper No. 6 one of those notes that went in to make the $1,600?

Defendants object—incompetent, immaterial, and improper cross-examination. Overruled. Exception.

A. Yes, sir.

136 Q. How much was reckoned for that note at that time—paper 6?

Defendants object—incompetent, immaterial, improper cross-examination. Overruled. Exception.

A. $176.80.

137 Q. Now give me the other notes that were reckoned in there and the amounts that were reckoned upon them.

A. There is one note of $160, one of $500, $112, $387.75, $100.

138 Q. What interest, if any, was payable upon this note, paper 6, that went into it at the time it was reckoned in to make up the $5,000?

Defendants object as incompetent, improper cross-examination. Overruled. Exception.

A. There was no interest due on it.

139 Q. How long had the interest been paid upon this note, paper

6—upon this $176.80; how long had that to run yet at the time it was reckoned into this $5,000 note?

Defendants object—incompetent, immaterial, no sufficient foundation laid, not proper cross-examination. Overruled. Exception.

A. Why, it was paid to maturity. The note was not given to us.

89 140 Q. The note was not given to your people?

A. No, sir.

141 Q. Now, this $160 note—what was the conditions of the interest upon that?

Defendants object—improper cross-examination, incompetent, immaterial. Overruled. Exception.

A. Our books show that the note was paid. The interest was paid until maturity. It was November 3rd.

142 Q. So that as to that $160 the interest was paid until Nov. 3. Did you make any allowance when you entered it in there?

A. Why, I expect I deducted the interest they collected from the other the same as we do.

143 Q. Then as a matter of fact where interest was overpaid you made deductions of interest?

A. Yes; as a matter of fact, we did. We did not have to do it really, but we did. If they want to renew a note before it is due, why, we can change it; we don't have to make any allowance.

Plaintiff offers in evidence as part of the cross-examination the two notes marked 5, with the endorsements on them, which constituted the $2,000 payment.

Defendants object—incompetent, immaterial, irrelevant, and improper cross-examination. Sustained. Exception.

Witness excused.

(Mr. PHELPS:) We rest.

Testimony in Defense of the Cross-petition.

GEORGE THRUSH, called and sworn, testified as follows:

144 Q. I will ask you if you are the defendant named George Thrush in this suit.

A. I am.

145 Q. Do you know the witness Mr. Johnson who was here upon the stand?

A. I do.

146 Q. Now, calling your attention, Mr. Thrush, to the note and mortgage marked Exhibits 1 and 2, respectively.

A. George Thrush is my signature.

147 Q. Mr. Thrush, who was present at the time your signature was signed there?

A. Mr. Johnson.

148 Q. Mr. Johnson, the witness who was here?
A. Yes.
149 Q. You may state to whom, if any one, you delivered *that* Exhibit 1 and 2, if you made a delivery of them.
A. The day I took over that, who I gave the note to?

90 (PHELPS:)

150 Q. Who you handed it to.
A. I handed it to Mr. Johnson.
151 Q. Was there anything said at that time for whom it was handed to Mr. Johnson?
A. For William Sumner.
152 Q. Was William Sumner present at the time that this note, Exhibit 1, and mortgage were given?
A. No, sir.
153 Q. He was not?
A. No, sir.
154 Q. What did Mr. Johnson say as to the note and mortgage being for Mr. Sumner or otherwise?
A. The reason was—he said that the bank could not take it; that it would have to be made to Mr. Sumner.
155 Q. Now, did you notice this Exhibit 1, whether the word at the bottom there, collateral, whether it was at the time you signed and delivered the note?

Defendants object as leading.
(COURT:) He may answer yes or no.

A. No, sir; it was not.
156 Q. You answer yes or no, if you know whether it was on there or not.
A. No, it wasn't on there.

(PHELPS:) We ask that — be stricken out. Sustained.

157 Q. When you signed the note and delivered it was there any other writing at the bottom of the note outside of the signature-George Thrush and Mattie N. Thrush?

Defendants object—leading and suggestive. Sustained.

158 Q. Mr. Thrush, you may go on and state to the court on what condition as to writing at the bottom of that note, Exhibit No. 1, that note was at the time that you signed and delivered it.

Defendants object—incompetent, immaterial, irrelevant. Overruled. Exception.

A. There was nothing on it, only our names and what was written in the note above our names.
159 Q. Now, Mr. Thrush, I will call your attention to this principal note of $5,000, Exhibit 3, signed George Thrush and Charles Thrush.
A. That is my signature.
160 Q. Now, do you know out of what that note was made up?

A. It was made up for the money that I got in the bank.

161 Q. From the bank?

A. Yes; and of notes that were already in the bank.

162 Q. Now, Mr. Thrush, you may state the conversation fully between you and Mr. Johnson at the time of the making and delivery of that note and mortgage to Sumner.

91 A. Well, the conversation at the time was—we talked the matter over. There was so many notes in the bank, and I was to get the balance in money to make up the amount of $5,000. I gave a chattel mortgage.

Objected to—incompetent, immaterial, irrelevant. Overruled. Exception.

163 Q. Go on and state what was said.

The objection goes, of course, to anything with reference to the chattel mortgage. Overruled. Exception.

A. That I would give a chattel mortgage to the bank, and also another mortgage on real estate to W. H. Sumner.

164 Q. Was there anything said about what the mortgage to William H. Sumner was to be for?

A. To make it better security.

165 Q. What was said about what Sumner was to do with the mortgage?

A. There was nothing said.

166 Q. Now, Mr. Thrush, I will call your attention to paper 6; is that one of the notes that was in the bank at the time that this principal note, paper No. 3, was given?

Objected to—immaterial, irrelevant, incompetent. Overruled. Exception.

167 Q. Is that one of the notes?

A. Yes.

(DOLEZAL:) It is offered in evidence, paper 6.

Objected to—immaterial, irrelevant, incompetent. Overruled. Exception. (Marked Exhibit 5.)

168 Q. I will ask you to state if this paper 11 was one of the papers that went into and made up that.

Objected to—leading and immaterial. Overruled. Exception.

A. Yes, sir.

169 Q. Mr. Thrush, did you or not give a note to the Schuyler national bank, bearing date August 9, 1889, for $387.75, the debt evidenced by which entered into this $5,000 note?

Objected to as leading. Sustained.

170 Q. Mr. Thrush, I will ask you to state whether or not you made a loan from the Schuyler national bank for which a note dated August 9, 1889, was given for $387.75?

Objected to as leading. Overruled. Exception.

A. Yes, sir.

171 Q. You may look at this paper No. 8, these three notes; you may state whether those are or are not the notes evidenced by that loan.

Objected to—leading. Sustained.

92 172 Q. Mr. Thrush, can you state to the court what notes entered into or what notes you had at the Schuyler national bank at the time that this principal note, Exhibit No. 3, was given?

A. I could not from memory. We have the papers and I can do that, but I could not do it from memory.

173 Q. Handing you these papers marked paper 11, paper 7, paper 8, paper 9, paper 10, paper 8, and paper 5, you may state whose signature, the *name* George Thrush, signed at the bottom of each of those, is?

A. It is my name.

174 Q. It is your name?

A. Yes.

175 Q. Now, can you state by reference to these papers what notes were at the bank and which were reckoned into this principal note of $5,000?

Objected to—incompetent, no sufficient foundation laid for the testimony called for. Overruled. Exception.

A. Yes, sir.

176 Q. You may go on, and state what notes were at the bank and entered into this $5,000 note.

A. One note of 17——

Objected to—the notes are the best evidence.

A. Paper No. 6, Exhibit 5, paper No. 8, No. 10, & 11.

(DOLEZAL:) I want to offer those in evidence—papers 8, 10, 11, 7, and 9.

Objected to—no sufficient foundation laid for their introduction, incompetent, immaterial. Overruled. Exception.

(Marked Exhibits 6, 7, 8, 9, and 10.)

177 Q. Mr. Thrush, calling your attention to Exhibit C, being three promissory notes, you may state to the court what those represent—Exhibit 6.

A. Represent a note signed by William Thrush.

178 Q. Are those for different sums of money or for one sum, different loans or for the same loan?

Objected to—incompetent, immaterial. Overruled.

A. They are for the same note, renewal for William Thrush's note.

179 Q. Now, Mr. Thrush, did you or not pay any interest upon this renewal dated August 9, 1889?

Objected to—leading. Overruled. Exception.

180 Q. Did you pay any interest upon any of those?
A. Yes; upon the two others.
181 Q. That is on the one dated Nov. 9, 1889?
A. Yes.
182 Q. Now, was there any agreement made or entered into
92½ between the Schuyler national bank and yourself at that time as to interest to be paid up on that note?

Objected to—leading. Overruled. Exception.

A. Yes: I was to pay one per cent.
183 Q. What was the agreement with reference to the rate of interest—that is, the note of Nov. 9, 1889?
A. William Thrush's name is on the note.

Objected to—incompetent. Overruled. Exception.

A. One per cent.
184 Q. For what time?
A. Per annum; that is the rate of one per cent. for that length of time.
185 Q. For what length of time? Do you know what interest is Thrush, anyway? You mean to say one per cent. per annum?
A. Yes. No, sir; I mean $12 on a hundred.
186 Q. $12 on a hundred?
A. Yes.
187 Q. Then you mean at the rate of 12 per cent. per annum?
A. Yes.

Objected to as leading, and ask that that be stricken.

188 Q. Now, you may state what you did with reference to paying the interest that was charged—that is, whether you ever paid it or not.
A. I did.
189 Q. Paid it to the Schuyler national bank?
A. Yes.
190 Q. Now, Mr. Thrush, the last note of that series, the one made May 12, 1890, was there any agreement as to interest upon that note?
A. Charged me 12.
191 Q. Was there any agreement as to interest upon that?
A. There was.
192 Q. Now, what was the agreement as to interest upon that?
A. 12 per cent.
193 Q. 12 per cent. per annum?
A. Yes.
194 Q. Did you ever pay interest upon that note of date May 12, 1890?
A. I did.
195 Q. Did you pay interest upon it at the rate of 12 per cent. per annum?

Objected to—leading. Sustained.

196 Q. At what rate of interest did you pay interest upon that?
A. 12 per cent.
197 Q. Now, with reference to the note dated Nov. 9, 1889, you may state what relation this note of May 12, 1890, bears to that note.
93 A. It is a renewal.
198 Q. These three notes that we have been talking about make up Exhibit No. 6?
A. They do.
199 Q. Now, I will call your attention to Exhibit 9, the third page of it, three notes. Now, Mr. Thrush, of the note dated Sept. 28, 1889, I will ask you to state if there was any agreement as to interest between you and the Schuyler national bank.
A. There was.
200 Q. You may state what that agreement was.
A. 12 per cent. per annum.
201 Q. Did you under that agreement pay interest to the Schuyler national bank?
A. What was that?
202 Q. Did you under that agreement pay interest to the Schuyler national bank?
A. I did.
203 Q. At what rate per annum did you pay interest on this note of $160 of Sept. 28th, 1889?
A. 12 per cent.
204 Q. What was that note given for—September 29th, 1889?
A. Well, I could not say whether it was all for cash or some for small notes that I have signed. I could not say positively.
205 Q. Do you know whether or not this interest was paid by you or was taken out of this $160?
A. I could not say that, Mr. Dolezal.
206 Q. You could not say that?
A. No; I could not.
207 Q. Now, when this $160 note came due, what was done then?
A. It was renewed.
208 Q. This page 2 of Exhibit 9, being the note dated December 30, 1889—what relation does that bear to the last preceding one?
A. It is a renewal of the former note.
209 Q. Was there any agreement as to interest between you and the Schuyler national bank upon that note?
A. There was.
210 Q. You may state what that agreement was.
A. 12 per cent.
211 Q. For what length of time?
A. For six months.
212 Q. Did you under that agreement pay any interest to the bank?
A. I did.
213 Q. At what rate upon that sum did you pay interest to the bank?
A. 12 per cent.

214 Q. Now, when that note became due, Mr. Thrush, what became of it; what was done with it?

A. It was renewed again.

93½ 215 Q. What relation does the note of July 3, 1890, bear to the last preceding one?

A. It is a renewal of the last note.

216 Q. Was there any agreement as to interest upon this last note of $160?

A. There was.

217 Q. You may state what it was.

A. One per cent.

218 Q. One per cent.?

A. 12 per cent.

219 Q. 12 per cent. for what length of time?

A. For four months.

220 Q. At the rate of 12 %?

A. Per annum for four months.

221 Q. At the rate of 12 % per annum did you pay interest on this last note of $160?

A. I did.

Objected to as leading, and move it be stricken out. Sustained.

222 Q. At what rate, if any, did you pay interest to the Schuyler national bank upon this last note of $160?

A. At the rate of 12 per cent. per annum.

223 Q. And for what length of time was this last note?

A. For four months.

224 Q. Now, calling your attention to paper No. 7, made up of two papers, what was that note given for?

A. Given for money.

225 Q. Now, was there any rate of interest agreed upon on this amount between you and the Schuyler national bank?

A. There was.

226 Q. You may state what the agreement was with reference to interest.

A. 12 per cent. per annum.

227 Q. Did you under that agreement pay any interest to the bank?

A. I did.

228 Q. At what rate, and during the term of that note did you pay interest upon it to the bank?

A. 90 days.

229 Q. And at what rate?

A. 12 per cent.

230 Q. Now, when that note became due at the expiration of 90 days, what was done with it?

A. Renewed.

231 Q. Was there any rate of interest agreed upon for the renewal?

A. There was.

232 Q. What rate of interest was agreed upon?

A. 12 % per annum.

233 Q. And did you pay any interest under that agreement on that first renewal?

94 A. I did.

234 Q. At what rate did you pay interest upon that renewal during the time it ran?

A. At the rate of 12 % per annum.

235 Q. Now, when that renewal came due what was done with the note?

A. It was renewed again.

236 Q. And when renewed again was there any agreement as to the rate of interest to be paid on the renewal?

A. There was.

237 Q. You may state what the agreement was.

A. 12 per cent. per annum.

238 Q. Upon that agreement did you pay interest to the Schuyler national bank for the time covered for that renewal?

A. I did.

239 Q. Now, at what rate did you pay it?

A. At the rate of 12 per cent. per annum.

240 Q. Now, calling your attention to the note, Exhibit No. 10, two notes, being page 2 of that exhibit, what was that note given for to the Schuyler national bank?

A. Given for money.

241 Q. Was there any agreement as to what interest was to be paid by you to the bank on that note?

A. There was.

242 Q. What was the amount to be paid?

A. 12 per cent. per annum.

243 Q. Under that agreement did you pay interest to the bank?

A. I did.

244 Q. What rate of interest did you pay to the bank for the time of the note, 90 days?

Objected to—no sufficient foundation laid for the introduction of this testimony. Overruled. Exception.

A. The rate of 12 per cent. per annum.

245 Q. When this note, Feb. 12, 1890, $500, became due, what was done then?

A. It was renewed.

246 Q. By this note of May 13, 1890?

A. Yes, sir.

247 Q. Was there any agreement as to interest with reference to this note of May 13, 1890?

A. There was.

248 Q. What rate of interest was agreed upon to be paid?

A. The rate of 12 per cent. per annum.

249 Q. For the time of the note—that is, the 90 days?

A. Yes.

250 Q. Under that agreement at what rate did you pay interest to the bank?

A. 12 per cent. per annum.

251 Q. Now, calling your attention to Exhibit 8, Mr. Thrush, made up of one note, the amount $112, what was that note given for?

A. I could not say what that note was given for, whether it was for some notes there or whether it was for money got at the time. It is so long ago that I can't remember.

252 Q. Now at the time of this note, Exhibit 8, was there any agreement made as to interest between you and the bank?

A. There was.

253 Q. You may state what that agreement was.

A. The rate of 12 per cent. per annum.

254 Q. Under that agreement for the four months that the note ran what rate of interest did you pay to the bank?

A. The rate of 12 per cent. per annum.

255 Q. Now, Mr. Thrush, referring to these Exhibits 5, 8, 6, 9, 7, and 10 on the 8th day of August, 1890, what was done with those exhibits and such renewals as were in force then and unpaid?

A. They were put into a $5,000 note.

256 Q. Is Exhibit No. 3 that $5,000 note?

A. It is.

257 Q. Now, at the time of making this Exhibit 3, in addition to those notes going in there, did you receive any moneys to make up that $5,000?

A. I did.

258 Q. Can you state to the court how many you received?

A. Not from memory; I can from my book.

259 Q. Have you your book here?

A. Yes.

260 Q. Will you refer to it and see?

(PHELPS:) Before you testify from that I would like to examine it.

(Mr. PHELPS:)

261 Q. This is a book kept by you?

A. No, sir; it is my bank book.

262 Q. Were those entries made by you?

A. No, sir.

263 Q. Do you know who made them?

A. Yes.

264 Q. In every instance?

A. Yes.

265 Q. Who?

A. Mr. Johnson.

266 Q. Positive as to that?

A. Yes.

267 Q. Then these are not your books?

A. Mr. Phelps, just a minute; I think there was a couple of the small entries—I would not be sure whether they were made by Mr. Johnson or Mr. Sumner when he was in the bank—that is, the first

small entries; I would not be sure as to that, but when it comes to the 8th of August, why, then on——

96 268 Q. Now, Mr. Thrush, you say you have no recollection of this and can only state by referring to this memorandum?

A. That is all, I think.

269 Q. Now, further than that, you say that you saw those entries made?

A. No; only I say I saw the one made on August 8th.

270 Q. Did you see those others made?

A. No, sir.

271 Q. Do you know that they were made at the time when the item was obtained?

Plaintiff objects because it throws no light.

272 Q. You say these entries here were made by Mr. Sumner or Mr.——

A. I would not say who the others is; only the one, Mr. Phelps, is all. I will say just the one on August 8th.

273 Q. Now, if there was not one here that was made on the 8th day of August, then you are mistaken about that?

A. Well, on the 8th or 9th.

274 Q. You say now that the one here on the third line of the first page, written on here, was made by either——

A. Yes; this here one right here.

275 Q. Then, calling your attention to the date Aug. 9, deposit $3,273.29, you say that that was made at the time?

A. Yes.

276 Q. Do you know who made that entry?

A. Mr. Johnson made it right before my eyes.

277 Q. You swear positively that Mr. Johnson made that entry with his own hands before your eyes?

A. I saw him do it.

278 Q. Are you as sure of everything else that you have testified to as you are of that?

A. I am.

279 Q. You are as sure of that as you are of everything else that you have testified to?

Objected to.

A. How is it, Mr. Phelps?

280 Q. Are you as sure that you are right with reference to this item as you are with reference to everything else that you have testified to?

A. I don't hardly know how to answer.

281 Q. You swear positively that was made by Mr. Johnson, in his own handwriting, in your presence?

Objected to because it has been gone over. Overruled.

A. Well, Mr. Johnson put it in the bank.

(Examination resumed by Mr. DOLEZAL:)

282 Q. Now, can you tell what that amount of money was that went in to make up that $5,000 Aug. 8, 1890?

97 A. After the interest was taken out I had $3,273.29.

283 Q. Now, was there any agreement made at the time this note, this principal note, Exhibit 3, was given as to the rate of interest that was to be paid upon this $5,000 evidenced by this principal note?

Objected to upon the ground that no sufficient allegation or no sufficient ground is laid in this defendant's answer for the introduction of this testimony. Overruled. Exception.

A. 12 per cent. per annum.

284 Q. (Question repeated.)

A. There was.

285 Q. You may state what that agreement was with reference to interest.

Objected to upon the ground that no sufficient foundation is laid in defendant's answer and as incompetent, immaterial. Overruled.

Objected to because no sufficient foundation laid by averment in the answer to admit of introduction of this testimony as to the rate of interest agreed upon at that time or paid. Overruled. Exception.

A. 12 per cent. per annum.

286 Q. Now, what amount of interest did you actually pay for that six months under the agreement on this note?

A. $305.

287 Q. Was the money deducted?

A. There was interest due me on these notes, and that was added. I borrowed $5,000 and the interest on these notes; there was interest due me, and that was added and the $5,000 besides, and then the interest taken out, which left me $3,000.

288 Q. What do you mean by interest due you on those other notes?

A. I had paid the interest ahead, and Mr. Johnson allowed me the interest that they had not earned.

289 Q. That is, some of those notes had not come at maturity?

A. No, sir; they hadn't come to maturity.

290 Q. Now, upon the expiration of that principal note of $5,000 what was done then?

A. It was renewed.

291 Q. You may look at paper No. 2. Is that your signature on the bottom of it?

A. Yes, sir.

292 Q. What was that note given for to the bank?

A. For the renewal of the principal note.

293 Q. That is for the renewal of this Exhibit No. 3?

A. No. 3.

(DOLEZAL:) We offer in evidence paper 12.
(Marked Exhibit 11.)

294 Q. Now, was there any agreement as to interest for that six months upon this $5,000?

98 A. There was.

295 Q. You may state what that agreement was.

A. 12 per cent. per annum.

296 Q. Now, under that agreement, did or did you not pay interest upon your note for that six months?

A. I did.

297 Q. How much did you pay for that six months?

Objected to—incompetent, immaterial, no sufficient foundation laid in the pleadings to admit of this testimony. Overruled. Exception.

A. $305.

298 Q. Now, when this note, Exhibit 11, came due, Mr. Thrush, what was done then?

A. It was renewed again.

299 Q. You may look at this note, paper 13. That is your signature?

A. That is.

300 Q. What relation does that bear to Exhibit 11?

A. That is a renewal of Exhibit 11:

(DOLEZAL:) We offer it in evidence.
(Marked Exhibit 12.)

301 Q. Now, at that time was there any agreement made between you and the Schuyler national bank with regard to the interest on that renewal?

A. There was.

302 Q. You may state what that agreement was.

A. 12 per cent. per annum.

303 Q. Under that agreement, for the six months unspecified in this Exhibit 12, you may state to the court how much interest you paid to the Schuyler national bank.

Objected to—incompetent, immaterial, no sufficient foundation laid in the pleadings for the introduction of such testimony. Overruled. Exception.

A. $305.

304 Q. Now, when that note became due what was done with it—when it became due Feb. 14–17, '92?

A. It was renewed.

305 Q. Calling your attention to paper 14, is that your signature?

A. It is.

306 Q. What relation does paper 14 bear to this Exhibit 12?

A. It is a renewal.

(DOLEZAL:) I offer in evidence paper 14. This one is for 60 days.
(Marked Exhibit 13.)

307 Q. Now, was there any agreement made as to the payment—as to any interest?

A. There was.

99 308 Q. What was the agreement as to interest that was to be paid?

A. 12 per cent. per annum.

309 Q. Under that agreement for the 60 days, did you or not pay—what interest did you pay to the bank?

Objected to—incompetent, no sufficient foundation laid in the pleadings for its introduction. Overruled. Exception.

A. Paid $105.

310 Q. Do you now remember how you paid that $105?

A. I believe I gave a check.

311 Q. You may examine paper No. 15. Is that your signature?

A. That is my signature.

312 Q. Is that or not the check with which that interest was paid?

A. It was.

(DOLEZAL:) We offer paper 15 in evidence.

Objected to—incompetent, immaterial, no sufficient foundation laid for its introduction. Overruled.

(Marked Exhibit 14.)

313 Q. Now, Mr. Thrush, when this note, Exhibit 13, dated Feb. 17, 60 days, became due, what was done with it?

A. It was renewed.

314 Q. You may look at paper 16. Is that your signature?

A. Yes, that is my signature.

315 Q. What relation does that paper 16 bear to this Exhibit 13?

A. It is a renewal.

(DOLEZAL:) We offer in evidence paper 16.

(Marked Exhibit 15.)

316 Q. Was there any agreement at the time of making this renewal, Exhibit 15, as to interest?

A. There was.

317 Q. What was the agreement as to interest?

A. 12 per cent. per annum.

318 Q. How much interest did you pay upon this note to the Schuyler national bank—60 days?

Objected to—incompetent, immaterial, no sufficient foundation laid in the pleadings for the introduction of this testimony. Overruled. Exception.

A. 60 days; $105.

319 Q. Now, upon the expiration of this Exhibit 15, what was done?

A. It was renewed.

320 Q. And have you or not the renewal note for that period?

A. I believe not.

321 Q. Now, Mr. Thrush, at that renewal was there any agreement as to the rate of interest?

100 A. There was.

322 Q. Do you remember as to how you paid that interest of that renewal?

Objected to because he hasn't shown that he has paid any interest.

323 Q. Upon the renewal that was made for this Exhibit 15, was there or not any agreement as to paying interest?

A. There was.

324 Q. What was the agreement as to paying interest?

A. 12 per cent. per annum.

325 Q. Did you pay any interest upon your renewal under that contract?

A. I don't know whether I paid the cash then or whether I gave a note for that.

326 Q. Did you do one or the other?

A. I done one of the two things, but I don't know what I did do. I think about that time that I was short of money—getting along that time. I ran short about that time. I don't know whether I gave the note or gave the money at the time and then paid the interest after. I know Mr. Johnson did do that once or twice for me.

327 Q. Now, I will call your attention, Mr. Thrush, to paper No. 7. Is that your signature?

A. That is my signature.

328 Q. Now, you may state what that was given for.

A. That was given for interest at that time.

329 Q. Interest?

A. Yes.

330 Q. Interest upon that renewal?

A. Yes.

331 Q. Upon this paper 17, afterwards paid by you?

A. Yes.

(DOLEZAL:) We offer in evidence paper 17.

Objected to—incompetent, immaterial, no sufficient ground having been laid for its introduction. Overruled. Exception.

(Marked Exhibit 16.)

332 Q. Now, at the time that that renewal for that interest for which this Exhibit 16 was given became due, what was done with the same?

A. I paid it.

333 Q. What was done with the principal note—not the interest note, but the principal note?

A. The principal was renewed again.

334 Q. You may look at paper 18. Is that your signature?

A. Yes.

335 Q. What relation does the paper 18 bear to the principal note

of $5,000, for the interest of which this $311 note, Exhibit 16, was given?

A. It was a renewal of it.

101 (DOLEZAL:) I offer in evidence paper 18.
(Marked Exhibit 17.)

336 Q. Now, was there or was there not any agreement as to what rate of interest was to be paid by you upon the $5,000 to the Schuyler national bank?

A. There was.

337 Q. You may state what that agreement was.

A. That note was by mutual agreement of me and the president of the bank; it should have been reduced to 10 per cent.

338 Q. What rate of interest did you pay on that note?

A. 10 per cent. per annum.

339 Q. Upon what amount was the 10 per cent. charged?

A. On the $5,000.

340 Q. On the whole $5,000?

A. Yes.

341 Q. And what interest under that agreement did you pay in amount upon the sum of $5,000 during the existence of that note?

Objected to—incompetent, immaterial, no sufficient foundation laid in the pleadings for the introduction of the testimony. Overruled. Exception.

A. Ten per cent. per annum.

342 Q. Reckoned on what sum?

A. On $5,000.

343 Q. Do you remember how long this demand note was carried along?

A. No, sir; I didn't.

344 Q. Do you remember whether, after that note, any other $5,000 notes were given—that is, after this note, Exhibit 17?

A. I don't know.

345 Q. Calling your attention to the stamp there—paid July 16, 1893—I will ask you to state whether that note continued, before being paid, until that time?

A. There was part, I think, of that note continued on, because I believe there is a credit. Ain't there a credit on this note?

346 Q. Yes.

A. There was, less that credit, renewal of that note.

347 Q. Now, calling your attention to paper No. 9; you may examine it; is that your signature?

A. It is.

348 Q. I will ask you to notice the date, it bearing date July 15, 1893?

A. Yes; July 15, 1893.

349 Q. Now, what relation, if any, does this paper No. 19 bear to this note of $5,000—that is, Exhibit No. 17?

A. It is a renewal of the remainder of Exhibit No. 17.

(PHELPS:)

350 Q. Renewal of the remainder of the preceding note?
A. Yes.
102 351 Q. Now, at that time, Mr. Thrush, when this was given, was there or not any agreement as to interest?
A. There was.
352 Q. What was the agreement as to interest?
A. 10 % per annum.
353 Q. Upon what sum?
A. Upon the remainder of the $5,000, which, I believe, was $3,000.
354 Q. Now, Mr. Thrush, do you know how it happened that this note is $3,212.78, and you say the preceding note as drawn there is $5,000. What made the difference?
A. If I could tell it, as the fellow said, in a farmer-like way, I could tell it.
355 Q. You may go on and tell.
A. Well, the note was $5,000, and they had security on my home.
356 Q. And what was done?
A. And I sold it, and they took $2,000 of it for to apply on this note, whilst the balance, which was first mortgage, left remaining, and the other one went to pay other notes, with papers that was connected with us. I sold the farm to Mr. Marxsen.
357 Q. What was his name—Peter H. Marxsen?
A. Yes, sir.
358 Q. This $2,000 that went from that farm onto this $5,000 note—do you know in what shape it went there; whether it went there in cash paid by you or by Marxsen, or how?
A. No, sir. Mr. Marxsen gave a note to William H. Sumner.

(PHELPS:) We object to this testimony — incompeteant, immaterial, no sufficient foundation laid for its introduction. Over-uled. Exception.

359 Q. Calling your attention to paper 5.
A. They are the two papers that were received for the farm.
360 Q. From——
A. From Peter Marxsen.
361 Q. That is Peter Marxsen's signature?
A. Yes; that is Peter Marxsen's signature.

(DOLEZAL:) We offer in evidence paper 5, being two notes together, with the endorsements appearing upon the same, the note of $400 and the note of $1,600.
Objected to—incompetent, immaterial, no sufficient foundation laid for its introduction. Overruled. Exception.
(Marked Exhibit 18.)

362 Q. Now, Mr. Thrush, after the 8th day of August, 1890, did you ever borrow any moneys from the Schuyler national bank?
A. No, sir; only what was borrowed before for the renewal of these old notes.

363 Q. After you gave the $5,000 note did you ever borrow any money from the Schuyler national bank.

A. Only renewed the note; didn't borrow any extra money.

364 Q. Did you get any money from them?

103 A. No.

365 Q. Now, Mr. Thrush, we were on paper 19, were we not?

A. I believe.

366 Q. Calling your attention to paper 19, "George Thrush," is that your signature?

A. That is my signature.

367 Q. What relation does that bear to Exhibit 17?

A. It is a renewal of the remainder.

(DOLEZAL:) We offer paper 19.

(Marked Exhibit 19.)

368 Q. That note dated July 15, this Exhibit 19, $3,212.78, you may state whether or not you received from the bank anything on those notes, Exhibits 18. Did you receive anything from the bank on those two notes?

A. I received no money for them.

369 Q. Did you receive anything from William H. Sumner?

A. No.

370 Q. Do you know how this Exhibit 19 came to be made for $3,212.78?

A. I do, sir.

371 Q. How was it?

A. They gave me credit on the $5,000 note.

372 Q. They was to give you credit on the $5,000 note?

A. Yes.

373 Q. Credit for what?

A. For two notes.

374 Q. Are these the notes, Exhibit 18, 416?

A. Yes; that is the note.

375 Q. Now, how did it come to be $3,212.78; do you know how that note came to be those odd hundred dollars?

A. Yes; the interest that had run on the $5,000 on demand up until the time of this renewal was added to the $3,000; it made it $3,212.78.

376 Q. Now, had you paid any of that interest in money, or is this the whole of the interest?

A. This is the whole of the interest.

377 Q. $212.78 was the whole of the interest, then, as I understand you to state. You did not pay any interest in money upon this demand note from the time that it was given until after this note was given?

A. That is right.

378 Q. Now, Mr. Thrush, I see an endorsement on this Exhibit 18 of $16 paid by George Thrush and $32.05 interest paid. You may explain that.

A. The way that came, when I sold the place I had to pay the

interest, as those notes drew interest from the time they were drawn until the time they were paid, and the party that bought the place would not pay the interest, and I had to go on the interest. I paid it to Mr. Marxsen, and Mr. Marxsen took it and paid it to the bank for me.

104 379 Q. Now, I will show you paper 20.

A. That is my signature.

380 Q. What relation does paper 20 bear to Exhibit 19?

A. It is the renewal of paper 19.

381 Q. Did you obtain any money at all at any time there?

A. No.

(DOLEZAL:) I offer in evidence paper 20.

(Marked Exhibit 20.)

382 Q. You may explain to the court how this difference came in between the amount of Exhibit 19 and Exhibit 20.

A. Exhibit 20 is $3,212.78; the next one is $3,384.12, which, having not the money to pay the interest, they added the interest of $3,212 into that note, and they figured the interest, and the interest was $171.34, making the whole $3,384.12.

383 Q. I will call your attention to the figures in pencil, $171.34, and the words "int." on the face of Exhibit 19.

A. They are Mr. Johnson's figures.

384 Q. That is the cashier?

A. Cashier Schuyler national bank.

385 Q. Mr. Thrush, do you know how these notes, one for $400 and the other for $1,600, being Exhibit 18, how they came to be made payable to W. H. Sumner?

A. Yes.

386 Q. You may go on and state.

A. As Mr. Sumner had the real-estate mortgage on my land, and Mr. Marxsen bought it, he made the notes payable to William Sumner.

(PHELPS:) We ask that — be stricken out—incompetent, immaterial, irrelevant. Sustained.

387 Q. Go on and state what was said and done at the time that these notes, Exhibit 18, were being made as to their being made to W. H. Sumner, and the reasons for it, and with whom that conversation was carried on.

Objected to, so far as the reasons are concerned.

A. Why, when we talked the matter of selling the place.

388 Q. Who talked the matter?

A. The cashier and me. Mr. Johnson and I said how would we have the notes made and said would we make them payable to William H. Sumner, the whole business.

389 Q. By cashier you mean Mr. Johnson?

A. Yes; cashier Mr. Johnson.

390 Q. And who wrote the body of the notes, do you know?

A. Well, now, I would not say whether it was Mr. Johnson or whether it was Mr. Hodsdon.

(PHELPS:)

391 Q. The question is, do you know?

A. I know one of the two men was there doing the writing,
105 and I don't know which one of the two men wrote the notes. Both men were there and both men were writing at the time.

392 Q. Was there anything said by Mr. Johnson in that conversation as to why these notes should be made payable to W. H. Sumner?

A. Yes.

393 Q. What did he say in that respect?

A. He said the bank could not take them and they could be made to W. H. Sumner.

394 Q. Were these notes—that is, Exhibit 18—secured by any security?

A. Yes.

395 Q. What security were they secured by?

A. They were secured by real estate, sir.

(DOLEZAL:) I will now offer in evidence the endorsement on Exhibit 17, as follows: "$1,600 paid by Marxsen, note March 4, 1893; $400 paid by Marxsen, note March 1, 1893."

396 Q. Now, Mr. Thrush, I will call your attention again back to the time that this note and mortgage was given to William H. Sumner—Exhibits 1 and 2. In your conversation with Mr. Johnson, was there anything said as to why a note of $5,000 was to be made to Mr. Sumner?

Objected to as having been already gone over. Overruled.

397 Q. Was there anything said as to why this $5,000 note and mortgage was to be made to Mr. Sumner?

A. No, sir.

398 Q. Did Mr. Johnson say anything on that branch?

A. Said make it to him.

399 Q. The question is did he say anything?

A. Yes; he said something.

400 Q. What did he say?

A. He said make it to William H. Sumner, not to the bank.

401 Q. Did he say why?

A. Yes; he said why.

402 Q. Well, what did he say on that?

A. He said the bank could not take it; he said it would have to be made to William H. Sumner.

403 Q. Mr. Thrush, before the making of this loan consummating this loan for which this $5,000 note was given, was there any negotiation about the loan had with Mr. Sumner by you, or about the making of it?

A. With Mr. Sumner himself?

404 Q. Yes.

A. No, sir; never saw Mr. Sumner in this transaction here.
405 Q. You never saw Mr. Sumner in the transaction?
A. No, sir.
406 Q. Did you talk with any one about consulting Mr. Sumner about it?
A. No, sir.

106 Cross-examination.

(By Mr. PHELPS:)

407 Q. This Exhibit One here, who is that signed by?
A. By George Thrush.
408 Q. And who else?
A. Mattie N. Thrush, my wife.
409 Q. Mattie N. Thrush, your wife, is defendant?
A. Yes, sir.
410 Q. She was there at that time and signed that?
A. Yes; the same day.
411 Q. This Exhibit 2, who signed that?
Q. George Thrush and Mattie N. Thrush, my wife.
412 Q. George N. Thrush is you?
A. Yes; George is myself.
413 Q. And Mattie N. Thrush is your wife?
A. Yes, sir.
414 Q. The defendant in this case?
A. Yes.
415 Q. Now, Mr. Thrush, prior to December, 1892, your testimony is that you paid upon the sums borrowed by you from the Schuyler national bank, represented in these exhibits, interest at the rate of 12 per cent. per annum? Is that right?
A. Yes; that is right.
416 Q. From and after Dec. 22, 1892, if I understand you correctly, you paid at the rate of 10 per cent. interest only?
A. That is what they were to give it to me for.
417 Q. Now, from that time you only paid interest at the rate of 10 per cent.?
A. That is what it was figured at.
418 Q. And that was all you paid?
A. Excepting—I was on one note.
419 Q. Which note?
A. On this one right here, in Mr. Johnson's own figures.
420 Q. This is of date July 15, 1893?
A. Yes, sir.
421 Q. Being paper and Exhibit 19?
A. Yes.
422 Q. You say that the interest you paid then was how much?
A. That is added into the notes in $171.74, and it is more than 10 per cent.
423 Q. But until you figured it last night you supposed it was only 10 per cent.?

A. I supposed it was 10 per cent. until I saw them figures. I never noticed it before.

424 Q. You have been acquainted with William H. Sumner for a long time, haven't you?

A. Known him many years.

425 Q. He was an officer in your bank from the organization of the bank, was he not?

A. I believe so, Mr. Phelps.

107 426 Q. You understood it that way?

A. I understood he was an officer or holder in it.

427 Q. And at the time you made this note and mortgage, Exhibit 1 and 2, he was president of the bank?

A. I believe so.

428 Q. And Mr. Johnson was cashier?

A. The cashier.

Redirect examination.

(By Mr. DOLEZAL:)

429 Q. You say you understood that he was the president of the bank?

A. Yes.

430 Q. What did you understand that he took this note for?

Objected to—improper redirect examination, fully gone over in the direct examination, no part of the cross-examination, rebuttal. Sustained. Exception.

(DOLEZAL:) The defendant- George Thrush and Mattie N. Thrush offer to prove by the witness now upon the stand that his understanding at the time of the giving of the mortgage was that the said defendant, William H. Sumner, was to protect the bank against a loan to the extent of said $5,000, and that the note and mortgage, Exhibit- 1 and 2, were given to said Sumner as security to indemnify him on account of any moneys that he might have been compelled or might have paid to the bank on account of said $5,000 note given by defendant George Thrush to the bank?

Objected to—improper redirect. Sustained. Exception.

Witness excused.

J. S. JOHNSON recalled.

(By Mr. DOLEZAL:)

431 Q. Mr. Johnson, you are cashier of the Schuyler national bank?

A. Yes.

432 Q. You are the party that took for and in behalf of the bank this Exhibit 19?

A. Yes, sir.

433 Q. Now, Mr. Johnson, you may state to the court how that Exhibit 19 came to be to the amount of $3,212.78.

Objected to upon the ground it is already gone over with on the cross-examination of Mr. Johnson when he was on the witness stand for defendant Sumner. Overruled. Exception.

A. This was the amount that the $5,000 note on which the $2,000 payment had been made amounted to on this day, July 15, 1893, with interest.

434 Q. With interest at what rate?

A. 10 per cent.

108 435 Q. Were there any payments of interest whatso-ver made in money on this $5,000 note, being Exhibit 17?

A. Excepting whatever portion of this endorsement might be considered interest.

436 Q. No other interest paid?

A. No, sir.

437 Q. And no other money paid?

A. No, sir.

438 Q. You are certain of that?

A. Why, there was no other money paid to the bank or for the bank; for the bank I mean; that is all the money the bank got.

439 Q. That was got by those two notes?

A. Got by those two notes—Exhibit 18.

440 Q. Do you know in whose handwriting these two notes are—Exhibit 18?

A. I do not.

441 Q. Did you direct who the payee in these notes should be—in the notes Exhibit 18?

A. I probably did.

442 Q. Why didn't you direct them to be made payable to the Schuyler national bank?

Objected to—not proper evidence, calling for a conclusion. Overruled. Exception.

A. It was simply a habit that the Schuyler national bank had of taking collateral in Mr. Sumner's name. We have taken it in many instances in that——

443 Q. Wasn't this the reason, that the bank did not have authority to take real estate as security on loans?

A. No, sir; we have authority to take real-estate loans as security.

444 Q. After the debt is contracted?

A. Partially.

445 Q. Didn't the fact that Sumner held the $5,000 mortgage and note have anything to do with taking those two notes in the name of William H. Sumner?

A. No, sir; I don't think it did, because we were simply in the habit of putting the collateral in his name.

446 Q. Why not put it in the name of the bank?

Objected to—immaterial, calling for a conclusion. Overruled. Exception.

A. It was simply our habit; I can't see any good reason for it myself.

447 Q. You can't see any reason for it now?

A. It was handier.

448 Q. I will call your attention to Exhibit 20, $3,384.12, to that note?

A. Yes.

449 Q. How was that note made up?

A. It was made up of this previous note, with interest to
109 the date of this note—not to the date of that note stamp, but the date of that note—Jan. 23.

450 Q. Jan. 23, interest on the note July 15, 1893, computed at what rate on the $3,212.78?

A. At 10 per cent.

451 Q. Until Jan. 23, 1894?

A. Yes.

452 Q. And then added to the principal?

A. Yes.

453 Q. And this note, Exhibit 20, was paid in renewal, and into that was added that interest and that property?

A. Yes.

454 Q. Now, this note, Exhibit 4, what note is that; what relation does it bear to Exhibit 20, being the note, Exhibit 4?

A. It is a renewal.

455 Q. A renewal of Exhibit 20?

A. A renewal of part of it.

456 Q. How does the discrepancy in the amount of the notes come about?

A. Because we were paid.

457 Q. How much were you paid?

A. We were paid the interest on the note to date at 10 per cent., and we were paid interest in advance.

458 Q. You was paid interest on the note—that is, on the $3,384.12 note, being Exhibit 20—paid interest upon it to what time?

A. Why it was reckoned in two amounts—that is, to date and then in advance.

459 Q. It was reckoned to date, March 31, 1894. How much money did you receive?

A. $62.98.

460 Q. And how much money did you receive at the time of the execution of Exhibit 4 as interest in advance?

A. $153.70.

461 Q. That was paid to you by Mr. Thrush?

A. Yes.

462 Q. Was that all the payment that you received, this $216.68?

A. No, sir.

463 Q. How much payment did you receive?

A. Enough to reduce the principal to——

464 Q. Give me the total payment that you received.

A. It would be $155.12.

465 Q. Have you that entered into any books of original entry?
A. Yes.
466 Q. Have you that book of original entry here?
A. Yes.
467 Q. Will you produce it?
Yes.
468 Q. You will please produce it.
A. What is the date?
469 Q. March 31, 1894.
A. The payments were interest up to date, $62.98.
110 470 Q. No; I want the book of original entry, where it was entered first—the whole payment that he made.
A. This is the book; yes; that is the way it was entered, paid, and renewed, and here is the other book of original entry, where the new note is entered, which includes the interest.

(DOLEZAL:) I will offer in evidence the entries here: "George Thrush, pr., $3,384.12; $62.98; and George Thrush, about $400."

A. That isn't George; that is Thomas Thrush.
471 Q. Thomas Thrush?
A. Yes; here is the other.
472 Q. Where he paid 62.98?
A. Yes.

(DOLEZAL:) I withdraw the offer.

473 Q. Now, I want the total payment. When did he make the payment so that the note was reduced to $3,229—that 3,384.12?
A. The total amount, the interest and the total, $371.80.
474 Q. He paid you, then, $371.80; is that it?
A. Yes.
475 Q. And that paid interest on $3,384.12 note up to that date and — a reduction?
A. Yes; it paid interest on that and it paid interest in advance and reduced the note.
476 Q. How much interest did it pay in advance?
A. $153.70.
477 Q. That was the interest on $3,229?
A. Yes; for 183 days.
478 Q. So that the fact is that from this time—from July 15, 1893—until March 31, 1894, a part of the time you charged compound interest on the sum $3,212.78, compound interest at 12 per cent., charged and collected; that is a fact, isn't it?
A. Why, the interest was added to two of the notes.

(PHELPS:)

479 Q. When it was renewed?
A. When it was renewed it was a separate transaction with the Schuyler national bank.
480 Q. But then it was given to evidence the same thing, the same debt?
A. It was just as I have already stated.

481 Q. You didn't advance any additional money?

A. No, sir.

482 Q. And since July 15, 1893, in the note of that date, the $212.78 is interest, is it not?

A. That was interest paid to that date.

483 Q. And that $212.78 represented interest reckoned at 10 per cent. upon $5,000, being on Exhibit 18?

A. Well, if you figure it up exactly, you will find it isn't quite ten per cent.—that ain't figuring it as we have a right to;
111 that that payment on March first would apply first on interest and the balance on principal. It isn't at ten per cent., and this note isn't figured at 10 per cent. You can figure it.

484 Q. That is the note, Exhibit 4?

A. Yes.

485 Q. That is the interest that was paid in advance on $3,229?

A. Yes; you can figure it.

486 Q. The advance interest?

A. The advance interest isn't at 10 per cent.

(PHELPS:)

487 Q. You mean it wasn't as much as that?

A. No; it wasn't.

488 Q. But in the note $3,384 and $3,212, being Exhibits 20 and 19, interest was figured—compound interest at 10 per cent.—was compounded?

A. We never considered it compounding, because we considered we was making a new loan for that amount.

489 Q. The facts—the interest was compounded at 10 per cent.

Objected to as calling for a conclusion and not the facts.

490 Q. Now, you considered, you said, that when you got a new one that that was a new transaction?

A. Yes; to a certain extent.

491 Q. If you ever thought it was a new transaction when the first renewal note was given for $5,000, why didn't you surrender the original $5,000 note?

A. Because that was mutually agreed then to be left as collateral.

492 Q. So the principal note of $5,000, marked Exhibit 3, is simply collateral?

A. It was left as collateral.

493 Q. That is simply a collateral note at the present time?

—. ——.

494 Q. Have you anywheres in there in your book that sum of $371.80, the total of payments?

A. Why, it is separately entered.

495 Q. On March 31, 1894?

A. It is separately entered. Our books is divided.

496 Q. Have you got a book of original entries where you enter the *the* amount in gross that you receive—a day book, where, if I pay your bank $500, it is entered there $500, to be reckoned in the day's proceedings?

A. These are the only books that relate to notes we have in the bank, excepting the tickler, but these are all the original entries.

497 Q. Well, haven't you got a book in your bank that if I should come to your bank and pay you $500, irrespective of whether I paid it on a note or anything else, that you would enter the payment there in gross sum as being made on that day?

A. No, sir.

498 Q. Was this $371.80 paid by check or in money?

112 A. Neither; a portion of it.

499 Q. A portion of it was paid in money, and a portion in check?

A. Well, I might say a check, too; a portion of it was paid through, you might say, check or money, but the most of it was paid in notes turned over.

500 Q. You say this was taken in Sumner's name by habit of the bank, for easier handling?

A. Why, it is easier to handle, easier to release, etc.

501 Q. That is for handling; if anything was required to be done, why Mr. Sumner might do it, and it would be quicker if done by him?

A. He could release it quicker than the bank could; we would have to have a meeting, really, to release such things.

502 Q. So it was taken so it could be handled in his name; that was the object of it?

A. Well, that note, you see, this never entered into the bank until it was paid; it was never in until it was paid; it was taken in August and laid away until it was paid.

503 Q. That one never entered the bank?

A. This one was turned over.

504 Q. The $1,600 note never entered the bank?

A. Well, never entered the bank paper until the cash was actually paid over.

505 Q. By whom was it held before that?

A. Well, it was held in the bank.

506 Q. It never appeared in the bank; it was held as Mr. Sumner's paper then?

A. No, sir.

507 Q. It was held as paper to his account?

A. It was held as collateral; you see there was a collateral paper, and this we bought from Mr. Thrush; we took it March first and allowed him interest to date on it; took it at $400, although it wasn't due for a year, and went in and was placed with bank paper.

508 Q. And Mr. Thrush paid interest on it, didn't he—that endorsement?

A. Well, the interest was refunded to Mr. Thrush; we took it on March first at the face of the note, at the interest; it was a transaction between Mr. Thrush and Mr. —— and not really between us.

509 Q. Mr. Thrush is shown to have paid $33.05 interest M'ch 6, 1894?

A. Yes; that is when the note became due, and we took it one year before that. We had the year's interest on it at 8 per cent.

510 Q. You had the year's interest on it?

A. Yes; at 8%.

511 Q. Now, I understood you to take these so that Mr. Sumner could handle them in his name if it was necessary; that his name would appear there and action be taken in his name, because it was easier?

113 Objected to—incompetant, immaterial. Overruled. Exception.

A. It was simply because our habit was to take it in Mr. Sumner's name *in* trustee, really,

512 Q. Well, why didn't you put trustee in these?

A. Well, you are asking me a hard question. Probably I would if I was going to do it over again.

513 Q. The fact is that Mr. Sumner held this as indemnity, and he could—whenever the bank was paid and you told him it was paid, he would release them, and if it was necessary to take action, why, action would be taken in his name; he would release in his name, and if it was necessary to begin foreclosure on the $5,000 note he would begin foreclosure in his name?

A. No; it wasen't the intention to do anything of that kind.

514 Q. It wasn't the intention to foreclose?

A. We diden't suppose we would have to foreclose.

515 Q. Well, you mean to say that this thing was done just like Topsy was named, just because she was named Topsy, and always been that way?

—. ——.

516 Q. Now, Mr. Johnson, why was this note of $5,000 taken at at all, Exhibit No. 1?

A. It was done to secure the bank as collateral.

517 Q. But you had a principal note of $5,000 signed by George Thrush to the bank?

A. That was done, and it was understood to be laid away and left as security, for he might owe us.

Plaintiff objects to what was understood and moves to strike it out. Sustained.

A. Well, that was what was said.

518 Q. Now, you had that principal note?

A. Yes; with different security.

519 Q. Why, Mr. Johnson, you knew at that time that you could have taken a mortgage reading to Mr. Sumner and described a note to your bank in it, described that principal note; you knew that at that time, didn't you?

A. I guess I wasn't that much of an attorney.

520 Q. You think you did not know that?

A. No, sir; I did not know it.

521 Q. You did not know that one note could be described in two or three different mortgages, and secured by all of them?

A. Well, no; I did not know that; I am not much of an attorney.

522 Q. Now, if you desire to transfer—if it had been desired to transfer this loan to some other bank, this note, it would have been endorsed by Mr. Sumner, would it not?

Objected to—immaterial, incompetant, irrelevant. Sustained. Exception.

523 Q. Do you know whether Mr. Hodsdon was present when these notes were made, these notes Exhibit 18?

114 Objected to—entirely immaterial. Overruled. Exception.

524 Q. E. T. Hodsdon?

A. Why, I don't think I saw those notes executed. I don't think they were executed in the bank at all; that is my recollection. I think they were probably executed in Hod's office.

525 Q. That is, E. T. Hodsdon is an attorney of that bank, or was at that time?

A. I don't know whether he was or not; he was not getting fees in the matter.

526 Q. He was the attorney of the Schuyler national bank?

A. Not in that matter.

527 Q. He was generally, wasn't he?

A. Why, I don't know whether he was or not at that time; we made a change some time ago, and I can't remember whether he was or not.

528 Q. Did you have authority to endorse this Exhibit 1 in Mr. Sumner's name?

A. Why, it didn't need any endorsement; it was left as collateral, and we coulden't do anything with it; we did not have any right.

Move to strike that all out because not responsive to the question. Sustained.

(COURT:) I think the question and answer both may be stricken out.

(DOLEZAL:) I offer in evidence the back of Exhibit No. 1. There isn't anything on it, simply showing the want of endorsement.

529 Q. Did you, as cashier of the bank, have authority, during this time whenever anything was paid into the bank, to surrender the paper of the bank?

A. Yes.

530 Q. Upon payment of paper to the bank, if it was all made payable to the bank, you had authority to surrender the paper, didn't you?

Objected to—immaterial. Overruled.

A. Why, I suppose I had.

531 Q. Did you receive any directions from Mr. Sumner as to the making of this loan to Mr. Thrush?

A. No, sir.

532 Q. Which was evidenced by this $5,000 note?

A. No, sir.

533 Q. Had received no directions whatsoever?

A. No, sir.

534 Q. Did you receive any directions from Mr. Sumner as to taking real-estate mortgages in his own name?

A. No; I think not. There was no instructions. It was simply a habit we had of taking collateral in his name, or any one that was satisfactory to the party giving it and to us, who we knew would hold it for the purpose.

115 535 Q. What was the object of having it made to this third party?

A. It was given as collateral.

536 Q. So that this third party might sue upon it?

A. We never contemplated any suits. I don't think that part ever had been thought of. So that the collateral could be turned over to the bank in case of necessity.

537 Q. Would be turned over to the bank in case of necessity?

A. It was turned over to the bank, in fact, right in the start. It was placed with the bank's papers.

538 Q. On collateral that you had taken that way, had you any before that time? Didn't those parties in whose name they were taken commence action upon them?

Objected to—immaterial.

539 Q. This thing was simply for fun, Johnson, was it?

A. That is all.

Cross-examination.

(By Mr. PHELPS:)

540 Q. I will ask you to state with reference to the interest, $171.34, which is in testimony was paid at a certain time. State the facts with reference to the time that that was computed on, and what rate of interest it is that was received at that time.

A. It was computed from July 15, 1893, to Jan. 23, 1894.

541 Q. At what rate?

A. At 10%.

542 Q. Was it at a greater rate than 10%?

A. No, sir.

543 Q. One cent short of it?

A. Well, something like that.

544 Q. Mr. Johnson, calling your attention to Exhibit 1 here, I will ask you whether you caused that to be recorded.

A. Yes.

545 Q. I will ask you whether it was recorded or not?

A. It was.

546 Q. Of the date here on the back?

Objected to as being a conclusion and not the best evidence.

547 Q. Do you know whether it was recorded or not?

Objected to—not the best evidence, incompetent.

(PHELPS:) We offer in evidence certificate on the back of Exhibit 2—the endorsement.

Plaintiff Gadsden now objects to the introduction of that certificate for the reason that it is disclosed by the testimony that the notary who purports to have acknowledged it was incompetent to have acknowledged said instrument, for the reason that he was a stockholder and cashier of the Schuyler national bank; that it was not acknowledged, as required by law, to entitle the said mortgage to record, incompetent and immaterial.

116–158 And defendant Thrush objects to the introduction of the certificate for the same reasons stated in the objection of the plaintiff Gadsden last above, and for the further reason that the instrument purports to involve the homestead of the defendants. Overruled. Exception.

* * * * * * *

159 $5,000.00. SCHUYLER, NEB., *Aug.* 8, 1890.

Two years after date we or either of us promise to pay to Wm. H. Sumner or order five thousand dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest at the rate of ten per cent. per annum, payable annually from date until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
MATTIE N. THRUSH.

Due ——.
No. —.
P. O., ——.
Collateral.

(On the margin:) Secured by —. Exhibit 1, paper 1.

Know all men by these presents that we, George Thrush and Mattie N. Thrush, husband and wife of Dodge county, State of Nebraska, in consideration of the sum of five thousand dollars in hand paid, do hereby sell and convey unto Wm. H. Sumner of Colfax county, and State of Nebraska, the following-described premises, situated in Dodge county, and State of Nebraska, to wit:

Southwest quarter section nineteen, township eighteen, range 5 E. (S. W. 4, sec. 19 T. 18 R. 5 E.) also north half southwest quarter, section twenty, township eighteen, range 5 E. (N. 2 S. W. 4 sec. 20, T. 18, R. 5 E.) also north half northwest quarter section twenty-nine, township eighteen, range 5 E. (N. 2 N. W. 4 sec. 29 T. 18 R. 5 E.) also southwest quarter of the southwest quarter section twenty-nine, township eighteen, range 5 E. (S. W. 4 S. W. 4, sec. 29, T. 18, R. 5 E.) all of above subject to prior mortgages amounting to seventy-nine hundred dollars ($7,900).

The intention being to convey hereby an absolute title in fee simple, including all the rights of homestead, to have and to hold the premises above described, with all the appurtenances thereunto belonging, unto the said Wm. H. Sumner and to his heirs and assigns forever; provided always, and these presents are upon the express condition that if the said George Thrush, his heirs, executors, or administrators, shall pay or cause to be paid to the said Wm. H. Sumner, his heirs, executors, administrators, or assigns, the sum of five thousand dollars, on the eighth day of August, 1892, with the interest thereon at ten per cent. payable annually according to the tenor and effect of the one promissory note of said George Thrush bearing even date with these presents, then these presents to be void, otherwise to be and remain in full force.

Signed the eighth day of August A. D. 1890.

GEORGE THRUSH.
MATTIE N. THRUSH.

In presence of—
J. S. JOHNSON.

THE STATE OF NEBRASKA, } ss:
Colfax County, }

On this eighth day of August, A. D. 1890, before me, J. Sherburne Johnson, a notary public in and for said county, personally came George Thrush and Mattie N. Thrush, his wife, personally to me known to be the identical persons whose names — affixed to the above deed as grantors, and acknowledged the execution of the same to be their voluntary act and deed.

Witness my hand and notarial seal.

J. SHERBURNE JOHNSON,
[SEAL.] *Notary Public.*

Exhibit 2, paper 2. (Have this deed recorded.) Mortgage deed. George Thrush and wife to William H. Sumner.

THE STATE OF NEBRASKA, } ss:
Dodge County, }

Entered on numerical index and filed for record in the clerk's office of said county the 24th day of September, 1890, at 4.10 o'clock and -- minutes p. m., and recorded in Book 2 of Mortgages, on page 145.

THOMAS KILLEEN,
County Clerk and ex Officio Register of Deeds.
——— ———, *Deputy.*

Pd. $1.
Mail Schuyler nat'l bank, Schuyler, Nebr.

$5,000.00. SCHUYLER, NEBRASKA, *Aug. 8th,* 1890.

Six months after date we or either of us promise to pay to the Schuyler national bank or order five thousand dollars, for value re-

ceived, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

161 Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Feb'y 11, '91.
No. 86785.
P. O. ——.

(Written across the face:) D C/w.
(On the margin:) Schuyler national bank.
(Endorsed:) 16 horses & cols., 12 heifers, 2 bulls, 58 cows & increase, harness, farm machinery, wagons, &c., & coll. note. Exhibit 3, paper 3.

$3,229.00. SCHUYLER, NEB., *Mar.* 31, 1894.

One hundred & eighty days after date we or either of us promise to pay to the Schuyler national bank or order three thousand two hundred twenty nine dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of ten per cent. per annum, payable semi-annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.

Due Sept. 27–30.
No. 91083.
P. O., ——.
(On the margin:) Secured by —.
(Endorsed:) Exhibit 4, paper 4. (Substituted for copy previously identified.)

$176.80. SCHUYLER, NEB., *Aug.* 2, 1890.

Four months after date we or either of us promise to pay to E. L. True or order one hundred seventy-six & 80/100 dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.

Due Dec. 2–5.
No. 86760.
P. O., Schuyler.

162 (Endorsed:) For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due. E. L. True. Exhibit 5, paper 6.

$387.75. SCHUYLER, NEBRASKA, *Aug. 9th*, 1889.

Ninety days after date we or either of us promise to pay to the Schuyler national bank or order three hundred eighty-seven & 75/100 dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

WILLIAM THRUSH.
GEORGE THRUSH.

Due Nov. 7–10.
No. 84539.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Nov. 26, 1889.

(On the margin:) Schuyler national bank.

(Endorsed.)

Cattle		129.00
Slave		20.00
2 waggon		30.00
1 single ha		6.00
Tools		5.00
Corn		4.30
		394.30
	11	
Not 3 m		43.90
389.75		1
3.45		
393.20		
42.90 not.		
436.10	R.	
394.30		
41.80		

163	3 horses.....	225	
	2 horses.....	20	387.75
	1 wagon.....	15	5.45
	2 mower-.....	50	42.89
	C. planter.....	20	1.90
	Binder.....	75	
		405	437.99

Exhibit 6, paper 8, 3 pieces.

$387.75. 16.29 due. SCHUYLER, NEBRASKA, *Nov.* 9, 1889.

Six months after date we or either of us promise to pay to the Schuyler national bank or order three hundred eighty-seven 75/100 dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due May 9–12.
No. 84945.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid May 31, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) Part of paper 8.

$387.75. SCHUYLER, NEBRASKA, *May* 12, 1890.

Four months after date we or either of us promise to pay to the Schuyler national bank or order three hundred eighty-seven & 75/100 dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Sept. 12–15.
No. 86501.
P. O., ——.

164 (Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Aug. 16, 1890.
(On the margin:) Schuyler national bank.

(Endorsed.)

	Cash.
15 60	600 00
	228 54
31 17	371 46
181 77	
212 94	
212 94	
15 60	
228 54	

Part of paper 8.

$100.00. SCHUYLER, NEBRASKA, *Jul-* 27, 1889.

Ninety days after date we or either of us promise to pay to the Schuyler national bank or order one hundred dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Oct. 25–28.
No. 84499.
P. O., Sc.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Oct. 26, 1889.
(On the margin:) Schuyler national bank.
(Endorsed:) Exhibit 7, paper 10, 2 pieces.

$100.00. SCHUYLER, NEBRASKA, *Ap'l* 29, 1890.

Four months after date we or either of us promise to pay to the Schuyler national bank or order one hundred dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to

collect this note I will also pay the plaintiff therein a reason-
165 able sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Aug. 29–1st Sept.
No. 86424.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Aug. 16, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) Part of paper 10.

$112.00. SCHUYLER, NEBRASKA, *June* 24, 1890.

Four months after date we or either of us promise to pay to the Schuyler national bank or order one hundred & twelve dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Oct. 24–27.
No. 86613.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Aug. 16, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) Exhibit 8, paper 11.

$160.00. SCHUYLER, NEBRASKA, *Sep.* 28, 1889.

Ninety days after date we or either of us promise to pay to the Schuyler national bank or order one hundred and sixty dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment
166 may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Dec. 27-30.
No. 84706.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Jan. 4, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) Exhibit 9, paper 9, 3 pieces. Six in 987; renewed for 6 mont. Inters. paid, $9.87.

$160.00. SCHUYLER, NEBRASKA, *Dec.* 30, 1889.

Six months after date we or either of us promise to pay to the Schuyler national bank or order one hundred and sixty dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due June 30th, July 3, '90.
No. 85093.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Jul- 12, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) Part of paper 9.

$160.00. SCHUYLER, NEBRASKA, *July* 3, 1890.

Four months after date we or either of us promise to pay to the Schuyler national bank or order one hundred & sixty dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment
167 may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Nov. 3-6.
No. 86683.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Aug. 16, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) Part of paper 9.

$500.00. 15.50 due. SCHUYLER, NEBRASKA, *Feb.* 12, 1890.

Ninety days after date we or either of us promise to pay to the Schuyler national bank or order five hundred dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due May 10-13.
No. 86120.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid May 31, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) 40 7 00
16 29
15 50
38 79

Exhibit 10, paper 7, 2 pieces.

$500.00. SCHUYLER, NEBKASKA, *May* 13, 1890.

Ninety days after date we or either of us promise to pay to the Schuyler national bank or order five hundred dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable

sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

168 Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Aug. 11-14.
No. 86500.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Aug. 16, 1890.
(On the margin:) Schuyler national bank.
(Endorsed:) Part of paper 8.

$5,000.00. SCHUYLER, NEBRASKA, *Feb'y* 11, 1891.

Six months after date we or either of us promise to pay to the Schuyler national bank or order five thousand dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Aug. 11-14.
No. 87376.
P. O., ——.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Aug. 19, '91.
(On the margin:) Schuyler national bank.
(Endorsed:) Exhibit 11, paper 12.

$5,000.00. SCHUYLER, NEBRASKA, *Aug.* 14, 1891.

Six months after date we or either of us promise to pay to the Schuyler national bank or order five thousand dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff herein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment
169 may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due Feb. 14–17, 1892.
No. 87949.
P. O., Rogers.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Mar. 5, '92. D. Schuyler national bank, Schuyler, Nebraska. Paid Mar. 5, '92.
(On the margin:) Schuyler national bank.
(Endorsed:) Exhibit 12, paper 13.

$5,000.00. SCHUYLER, NEBRASKA, *Feb'y* 17, 1892.

Sixty days after date we or either of us promise to pay to the Schuyler national bank or order five thousand dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Secured by both chat. & R. E. mtg.
Due Apr. 17–20.
No. 88629.
P. O., Rogers.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Apr. 16, '92.
(On the margin:) Schuyler national bank.
(Endorsed:) Ex. 13. Exhibit 13, paper 14.

SCHUYLER, NEB., *Mar.* 1892 *189–*. No. —.

The Schuyler national bank

Pay to —— —— *int.* or bearer —, $105.00, one hundred & five dollars.

GEORGE THRUSH.

Schuyler national bank, Schuyler, Nebraska. Paid Mar. 1, '92.

(On the margin:) Ex. 13.
(Endorsed:) Exhibit 14, paper 15.

170 $5,000.00. SCHUYLER, NEB., *April* 20, 1892.

Sixty days after date we or either of us promise to pay to the Schuyler national bank or order five thousand dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of ten per cent. per annum, payable semi-annually, from maturity until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

Sureties or endorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.
CHARLES THRUSH, SR.

Due June 19–22.
No. 88804.
P. O., ——.
Coll.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Sep. 2, '92.
(On the margin:) Secured by —.
(Endorsed:) Exhibit 15, paper 16.

$311.80. SCHUYLER, NEBRASKA, *Jun-* 24, 1892.

Sept. 1st, 1892, after date we or either of us promise to pay to the Schuyler national bank or order three hundred eleven & $\frac{80}{100}$ dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from maturity until paid.

And in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.

P. O., Rogers.
Due Sept. 1–4.
No. 89033.
Note due Dec., 92.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid Sep. 2, '92.
(On the margin:) Schuyler national bank.
(Endorsed:) Exhibit 16, paper 17.

$5,000.00. SCHUYLER, NEBRASKA, *Dec.* 22, 1892.

On demand after date we or either of us promise to pay to the Schuyler national bank or order five thousand dollars, for value

received, payable at the Schuyler national bank, Schuyler,
171 Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from date until paid.

And in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.

P. O., ——.
Due ——.
No. 89614.

(Written across the face:) Schuyler national bank, Schuyler, Neb. Paid Jul- 15, 1898.

(On the margin:) Schuyler national bank.

(Endorsed:) $1,600.00, paid by Marxsen, note Mar. 4, 1893; 400, paid by Marxsen, note Mar. 1, 1893. Exhibit 17, paper 18.

$1,600.00. SCHUYLER, NEB., *August* 24, 1892.

March first after date we or either of us promise to pay to W. H. Sumner or order sixteen hundred dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of ten per cent. per annum, payable semi-annually, from maturity until paid.

And in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or endorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

PETER H. MARXSEN.

P. O., ——.
Due Mar. 1–4, '93.
No. ——.

(Written across the face:) First national bank, Schuyler, Neb. Paid Mar. 4, 1892.

(Endorsed:) W. H. Sumner, J. S. J. Endorsement guaranteed. Schuyler national bank, Schuyler, Nebr. Paid Mar. 4, 1893. Schuyler national bank, Schuyler, Neb. Exhibit 18, paper 5.

$400. 17.05. SCHUYLER, NEB., *August 24th*, 1892.

March 1st, 1894, after date we or either of us promise to pay to W. H. Sumner or order four hundred dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of eight per cent. per annum, payable semi-annually, from date until paid.

And in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent.,

to be fixed by the court, as an attorney's fee. Sureties or
172 endorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

PETER H. MARXSEN.

P. O., ——.
Due Mar. 1–4, '94.
No. 89823.
Collateral.

(Written across the face:) Schuyler national bank, Schuyler, Nebraska. Paid May 5, 1894.
(Endorsed:) $16.00 int. paid by Geo. Thrush; 33.05 int., paid Mar. 6, 1894, without recourse. W. H. Sumner. Part of paper 5.

$3,212.78. 171.34 int. SCHUYLER, NEBRASKA, *Jul-* 15, 1893.

January 20th, 1894, after date we or either of us promise to pay to the Schuyler national bank or order thirty-two hundred twelve 78/100 dollars, for value received, payable at the Schuyler national bank, Schuyler, Nebraska, with interest, at the rate of ten per cent. per annum, payable annually, from date until paid.
And in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee. Sureties or endorsers hereby consent that time of payment may be extended without notice thereof and waive protest and notice of non-payment. Note changed to read int. from date before signing.

GEORGE THRUSH.

P. O., Rogers, Neb.
Due Jan. 20–23, 1894.
No. 90234.

(Written across the face:) Schuyler national bank, Schuyler, Neb. Paid Jan. 20, 1894.
(On the margin:) Schuyler national bank.

(Endorsed.)

3,212.78
171.34
3,384.12

Exhibit 19, paper 19.

$3,384.12. SCHUYLER, NEB., *Jan.* 23, 1894.

April first, 1894, after date we or either of us promise to pay to the Schuyler national bank or order thirty-three hundred eighty-four 12/100 dollars, for value received, negotiable and payable without defalcation or discount at the Schuyler national bank, Schuyler, Neb., with interest, at the rate of 10 per cent. per annum, payable

semi-annually, from date until paid; and in case of a suit brought to collect this note I will also pay the plaintiff therein a reasonable sum, not exceeding ten per cent., to be fixed by the court, as an attorney's fee.

173–224 Sureties or endorsers hereby consent that time of payments may be extended without notice thereof and waive protest and notice of non-payment.

GEORGE THRUSH.

Due Apr. 1–4.
No. 90817.
Schuyler national bank, Schuyler, Nebraska. Paid Mar. 31, 1894.
(Endorsed:) Exhibit 20, paper 20.

* * * * * * *

225 The foregoing is all the evidence offered or given by either party on the trial of the cause, and on application of the plaintiff this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

Dated Dec. 18, 1895.

WILLIAM MARSHALL, *Judge.*

STATE OF NEBRASKA, } ss:
Dodge County, }

I, Edwin R. Mockett, one of the stenographic reporters in and for the sixth judicial district of Nebraska and in and for the county of Dodge, hereby certify that the above and foregoing is a true, full, and correct transcript of all the evidence offered and given by either party upon the trial of the above-entitled cause, together with the objections of the said parties, the rulings of the court thereon, and the exceptions of the said parties thereto, according to the best of my ability.

EDWIN R. MOCKETT, *Reporter.*

Received of plaintiff and defendants George Thrush and Mattie N. Thrush, for examination and amendment, a draft of a bill of exceptions in the above case of James Gadsden *vs.* George Thrush, tried in the district court of Dodge county, at the January, 1895, term (M'ch 19–21, 1895).

Dated Oct. 21, 1895.

GEO. H. THOMAS,
Att'y First National Bank.
C. J. PHELPS,
R.,
Att'y for Sumner & Schuyler Nat'l Bk.
J. A. GRIMISON,
Attorney for Nebraska State Bank.

226 I herewith return the draft of the bill of exceptions in the case of Gadsden *vs.* Thrush, submitted to me on the 21 day of October, 1895, and propose no amendments thereto.

GEO. H. THOMAS,
Att'y First Nat'n'l Bank.
C. J. PHELPS,
Att'y for Sumner & Schuyler Nat'l Bk.
J. A. GRIMISON,
Attorney for Nebraska State Bank.

(Endorsed:) 8315. Gadsden *v.* Thrush. Bill of exceptions. Supreme court of Nebraska. Filed Feb. 21, 1896. D. A. Campbell, clerk.
(Endorsed:) 12533. James Gadsden *v.* George Thrush, *et al.*, Bill of exceptions. Supreme court of Nebraska. Filed Jan. 22, 1902. Lee Herdman, clerk.

And afterward, to wit, on the 24th day of January, 1902, there was filed in the office of the clerk of said supreme court a certain stipulation, in words and figures following, to-wit:

In the Supreme Court of Nebraska.

JAMES GADSDEN *vs.* GEORGE THRUSH ET AL. } Stipulation.

It is hereby stipulated and agreed by and between the appellants herein, William H. Sumner and The Schuyler National Bank of Schuyler, Nebraska, and the appellees herein, that this cause may be advanced and placed upon the call for February 4th, 1902, and at that time submitted on the briefs heretofore filed herein on
227 the former hearing of said cause, with such additional citation of authorities as counsel may present.

C. J. PHELPS,
Attorney for Appellants.
GEO. H. THOMAS,
Attorney for Appellees.

(Endorsed:) 12533 James Gadsden *v.* George Thrush *et al.* Stipulation to submit. Supreme court of Nebraska Filed Jan. 24 1902 Lee Herdman clerk.

And afterward, to wit: on the 4th day of February, the following proceedings were had and done in the said court:
The following cases were argued and submitted:

* * * * * * *

GADSDEN v. THRUSH. } 12533. Appeal, Dodge.

And afterward, to wit, on the 19th day of February, 1902, there was filed in the office of the clerk of said supreme court a certain *opinion in words and figures following, to wit:*

228 GADSDEN v. THRUSH. } No. 12533.

Opinion Filed February 19, 1902.

1. It is a settled rule in this court that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding, not only upon the trial court, but this court as well, and will not, ordinarily, be re-examined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. Missouri P. R. Co. *v.* Fox, 60 Nebr. 531.

2. No new question being presented on the second appeal the decree of the district court is affirmed.

229 HOLCOMB, *J.:*

This is the second appearance in this court of the above entitled cause on appeal. On the first appeal the decree of the district court was reversed and the cause remanded for a new trial with directions to ascertain the amount of money advanced to Thrush by the Schuyler national bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any; to postpone the lien of the First national bank to that of the plaintiff, and for such further proceedings as might be necessary and not inconsistent with the opinion rendered in the case. Gadsden *v.* Thrush, 56 Nebr., 565.

A rehearing of the cause was subsequently allowed and upon a reargument a decision was rendered adhering to the former judgment of reversal. At the close of the opinion on rehearing it is said: "For the reasons given we think the former opinion should be adhered to, and the order therein prescribed should govern the further proceedings in this case." Gadsden *v.* Thrush, 58 Nebr., 340.

Upon the cause being remanded for a new trial in conformity with the views expressed in the two opinions heretofore referred to another trial has been had in the district court and a decree rendered consistent with the mandate filed in the court below.

From this decree the Schuyler National Bank and William H. Sumner appeal. The former opinions give a full statement of the matters in issue and it is unnecessary to here restate them. No complaint is made as to any action of the trial court which could be

regarded as contrary to the law of the case as heretofore announced on the first appeal nor is it contended that any error or mistake was made in determining the amount due the appellant bank for which it should have a lien and foreclosure thereof in conformity with the views expressed in the first opinion. No new briefs have been filed by appellants and we are asked only to again investigate and reconsider the same questions presented for consideration and determination on the first appeal and which were therein decided. This we cannot do. The questions presented for decision by the first appeal having been fully considered and adjudicated must be accepted as the law of the case binding on the parties in all subsequent proceedings and cannot again be opened up for re-examination and a new decision thereon.

230

In Missouri P. R. Co. *v.* Fox, 60 Nebr., 531, it is held: "It is a settled rule in this court that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding, not only upon the trial court, but this court as well, and will not, ordinarily, be re-examined in a subsequent review of the proceedings of an inferior court had in the further trial of the action." See also Barker *v.* Wheeler, 60 Nebr., 470; Wittenburg *v.* Mollyneaux, 60 Nebr., 583; State *v.* Commissioners of Cass Co., 60 Nebr., 566; Motley *v.* Motley, 60 Nebr., 593; Hendershott *v.* W. U. T. Co., 87 N. W. Rep., (Ia.), 288; Terry *v.* City of Fairbault do., (Minn.), 917; Finney *v.* Guy, 87 N. W. Rep. (Wis.), 255.

We observe nothing to indicate that this case as now presented does not come altogether within the rule mentioned and for that reason we must hold the decree appealed from to be in conformity with the law and the same should therefore be, and accordingly is affirmed.

231 And on the same day, to-wit, on the 19th day of February, 1902, the following proceedings were had and done in the said court:

JAMES GADSDEN, Appellee, *v.* GEORGE THRUSH, CHARLES THRUSH, SR., Mattie N. Thrush, Appellees, Impleaded with Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased, and J. C. Noyes, Impleaded with William H. Sumner, Appellant, and The Nebraska State Bank of Schuyler, Nebraska, The First National Bank of Schuyler, Appellees, and The Schuyler National Bank of Schuyler, Nebraska, Appellant.	Appeal from the District Court of Dodge County. No. 12533. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel, on consideration whereof, the court finds there is no error

apparent on the record in the proceedings and judgment of the district court. It is, therefore, considered by the court that said judgment be and the same hereby is affirmed at the costs of the appellant, taxed at $15.70 and that a mandate issue accordingly.

And afterward, to-wit, on the 28th day of February, 1902, there was filed in the office of the clerk of said supreme court a motion for rehearing in words and figures following, to-wit:

232 In the Supreme Court of Nebraska.

JAMES GADSDEN, Plaintiff,
vs.
GEORGE THRUSH, MATTIE N. THRUSH, NEBRASKA STATE Bank, William H. Sumner, The Schuyler National Bank of Schuyler, Nebraska; Englebert Folda and Martha Folda, Administrators of the Estate of F. Folda, Deceased, Defendants. } No. 8315.

Motion for Rehearing.

Now comes William H. Sumner, for and on behalf of the Schuyler National Bank, of Schuyler, Nebraska, and the said Schuyler National Bank, of Schuyler, Nebraska, defendants herein, and move the court for a rehearing of said cause and, for grounds of their motion, say:

First. That said Schuyler national bank is an association incorporated under the laws of the Congress of the United States, relating to national banks.

Second. That by the decision of this court the said Schuyler national bank has been denied a right secured to it by the laws of the United States relating to national banks, in this, to-wit: That in said decision the provisions of the law of the State of Nebraska, relating to interest and providing a penalty for usury, have been declared against said Schuyler national bank and embodied in said decision.

That said decision is erroneous because the penalties provided
233 in sections 5197 and 5198 of the Revised Statutes of the United States, are exclusive, and they only can be enforced against the Schuyler national bank, because it is fully shown in the pleadings, proof and record that the transaction in suit between said Schuyler National Bank and the defendant, George Thrush, arises solely from moneys loaned on its own account by said Schuyler national bank to said George Thrush, and interest paid thereon by said George Thrush to said Schuyler national bank, between whom, the decision complained of was made.

Third. The defendant George Thrush in his answer to the Schuyler National Bank's cross petition, fully acknowledges the transaction involved to be a loaning of money by said bank to him, and sets out the items of interest by him paid, always, to the said Schuyler national bank, acknowledging that the note and mortgage to William H. Sumner were collateral to the debt due the said bank, but in his

prayer for relief, asks to have the amounts of interest so paid deducted from the principal sum loaned, which this court, by its decision, complained of, orders done, which decision denies said Schuyler national bank its rights secured by the laws of Congress relating to national banks, imposing upon said national bank the penalties of the usury laws of the State of Nebraska, which do not apply to national banks, and ought not to be imposed in this suit between the said Schuyler National Bank and the said George Thrush.

Fourth. The decision is based upon the error of the court in assuming, in the opinion, that the note and mortgage to William H. Sumner were made with intent "to evade the inhibition against the taking by a national bank of real estate security for loans
234 made at the time," whereas the fact is fully shown, in Johnson's testimony, that no such interest existed, and the reason for taking the security given was sufficiently shown. The mortgage was not taken wholly for money then loaned, but largely for a debt past due.

Fifth. The naming of William H. Sumner as a mortgagee, was not done with intent to in any way deceive or defraud said George Thrush, nor in any way did, or could it effect his liability, or the right of the bank to foreclose the mortgage.

Sixth. In no pleading in said case does the defendant George Thrush plead the estoppel upon which the decision sould seem to be based.

C. J. PHELPS,
Att'y for William H. Sumner and the Schuyler National Bank of Schuyler, Nebraska.

(Endorsed:) 12533. In the supreme court of the State of Nebraska. James Gadsden *v.* Geo. Thrush, *et al.* Notice and motion for rehearing. Supreme court of Nebraska. Filed Feb. 28 1902 Lee Herdman clerk. C. J. Phelps, att'y for appellants.

And on the same day, to-wit, on the 28th day of February, 1902, there was filed in the office of the clerk of said supreme court a certain notice of said motion for rehearing, in words and figures following, to-wit:

235 In the Supreme Court of Nebraska.

JAMES GADSDEN
vs.
GEORGE THRUSH ET AL.

To the appelle-s and their attorney, George H. Thomas, Esq.:

You will take notice that the appellants, William H. Sumner and The Schuyler National Bank, of Schuyler, Nebraska, will, on the 28th day of February, 1902, file their motion for a rehearing in said cause, a copy of which is hereto appended, and that on Tuesday, the

fourth day of March, 1902, they will submit said motion upon their brief, heretofore filed in said court, sustaining a like motion heretofore submitted on a like motion.

THE SCHUYLER NATIONAL BANK AND
WILLIAM H. SUMNER, *Appellants.*
C. J. PHELPS, *Their Attorney.*

The service of the above notice and the receipt of a copy of said motion is hereby acknowledged this 27th day of February, 1902.

GEO. H. THOMAS,
Att'y for George and Mattie N. Thrush, Appellees.

(Endorsed:) 12533. In the supreme court of the State of Nebraska. James Gadsden *v.* Geo. Thrush, *et al.*, Notice and motion for rehearing. Supreme court of Nebraska Filed Feb. 28 1902 Lee Herdman clerk. C. J. Phelps, att'y for appellants.

236 And afterward, to-wit, on the 19th day of March, 1902, there was rendered by said court and entered of record in the journal of said court a certain judgment in words and figures following, to-wit:

237 In the Supreme Court of the State of Nebraska.

JAMES GADSDEN, Appellee, *v.* GEORGE THRUSH, CHARLES THRUSH, SR., Mattie N. Thrush, Appellees, *et al.*, Impleaded with William H. Sumner, Appellant, and The Nebraska State Bank of Schuyler, Nebraska; The First National Bank of Schuyler, Appellees, and The Schuyler National Bank of Schuyler, Nebraska, Appellant.	Appeal from the District Court of Dodge County. No. 12533.

This cause came on to be heard upon a motion by the appellants for a rehearing herein, on consideration whereof by the court, it is ordered that said motion be and the same hereby is overruled and a rehearing denied.

238 And be it further remembered that heretofore, on the dates hereinafter named the following proceedings were had and done in the said supreme court of the State of Nebraska, in an action therein pending, wherein the parties hereinbefore named were parties, and wherein the title of said action was as follows:

JAMES GADSDEN, Appellant, *vs.* GEO. THRUSH, CHARLES THRUSH, SR., Mattie N. Thrush, Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased; Wm. H. Sumner and The Nebraska State Bank of Schuyler, Nebraska; J. C. Noyes, The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, Appellees.	Appeal from the District Court of Dodge County. No. 8315.

Be it remembered that on the 21st day of February, 1896, there was issued from the office of the clerk of said supreme court a certain notice in words and figures following, to-wit:

Notice of Appeal.

THE STATE OF NEBRASKA, *ss*:

The sheriff of the county of Dodge:

You are hereby commanded to notify George Thrush, Charles Thrush, Sr., Mattie N. Thrush, Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased, J. C. Noyes, William H. Sumner, The Nebraska State Bank of Schuyler, Nebraska, The First National Bank of Schuyler, Nebraska
239 and The Schuyler National Bank, of Schuyler, Nebraska, that an appeal has been taken to the supreme court of the State of Nebraska by James Gadsden asking the reversal of the judgment against him rendered on the 31st day of August, 1895, in a certain cause in the district court of Dodge county, wherein said James Gadsden was plaintiff and said George Thrush, *et al.* were defendants and to appear before the supreme court at the city of Lincoln, on the 15th day of September, 1896, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this notice on or before ten days after you have received the same,

Witness my hand and the seal of said court at the city of Lincoln, this 21st day of February, 1896.

[SEAL.] D. A. CAMPBELL, *Clerk.*

General No. 8315. Supreme court State of Nebraska. James Gadsden, appellant, *v.* George Thrush, *et al.*, appellees, notice of appeal.

And afterward, to-wit: on the 16th day of June, 1896, said notice was returned and filed in the office of the clerk of said supreme court, indorsed as follows, to-wit:

Service of the within notice is hereby accepted this 25 day of Feb.,

1896. Englebert F. Folda and Martha F. Folda, administrator and administratrix of the estate of F. Folda, deceased, by their att'y, Miles Zentmeyer, Nebraska State Bank of Schuyler, Nebraska.
240 By its attorney J. A. Grimison. First National Bank of Schuyler, by Geo. H. Thomas, att'y.
Feb'y 29, 1896.

THE STATE OF NEBRASKA, }
Colfax County. }

I do hereby certify that I received this notice on the 26th day of February, 1896, and on the 29th day of February, 1896, I served the same on the within-named defendants, William H. Sumner and The Schuyler National Bank of Schuyler, respectively, by delivering to and leaving with Charles J. Phelps, the attorney for said defendants, personally, a true and duly certified copy of said notice of appeal at and within said county of Colfax.

Dated Feb'y 29, 1896.

CHRIS KROEGER, *Sheriff*,
By O. VAN HAUSEN, *Deputy*.

Fees.

Service	1.25
1 copy	.25
	$1.50

Supreme court of Nebraska. Filed June 16, 1896. D. A. Campbell, clerk.

And afterward, to-wit, on the 3rd day of November, 1898, there was rendered by said court and entered of record upon the journal thereof a certain judgment in words and figures, following, to-wit:

241 JAMES GADSDEN, Appellant,
vs.
GEO. THRUSH, CHARLES THRUSH, SR., Mattie N. Thrush, Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased; Wm. H. Sumner and The Nebraska State Bank of Schuyler, Nebraska; J. C. Noyes, The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, Appellees.

No. 8315. Appeal from the District Court of Dodge County. Judgment of Reversal.

This cause came on to be heard, was taken up and argued by counsel; on consideration whereof the court finds there is error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judg-

ment be, and the same hereby is, reversed, and the cause remanded with directions to ascertain the amount of money advanced to Thrush by the Schuyler national bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any; to postpone the lien of the First national bank to that of the plaintiff, and for such further proceedings as may be necessary and not inconsistent with the opinion of the supreme court filed herein, and that the appellant recover from the appellees his costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 3rd day of November, 1898, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

Opinion. Filed November 3, 1898.

JAMES GADSDEN
v.
GEORGE THRUSH. } No. 8315.

1. A party to an action who has failed to answer the petition of another party, stating a cause of action against him, cannot be heard on appeal to question the correctness of a judgment entered on such petition, although other parties put its averments in issue and it was not sustained by the proof.

2. A executed a note and mortgage to B for the purpose of obtaining a loan from the latter. They were delivered to C, who was to act as an intermediary. B refused to make the loan, whereupon C advanced to A the money from the funds of a bank of which C was cashier. The bank retained the note and mortgage without change and without redelivery, A not knowing how the loan was effected. Held, that the mortgage was inoperative, there being no concensus, and there never having been an effectual delivery.

3. A mortgagee is not estopped from assailing the validity
242 of an apparently senior lien by a mere exception from the mortgagor's covenant against incumbrances of a class of liens which would include that assailed if it were valid.

4. A national bank took as security for a debt partly pre-existent and partly created at the time a real-estate mortgage naming an individual, an officer of the bank, as mortgagee. The transaction was usurious. Held, that having given the transaction the form of one with an individual for the purpose of evading the liabilities peculiar to national banks, the bank could not be heard to assert its true nature for the purpose of evading the liabilities attaching to individuals and of claiming the privileges of national banks.

IRVINE, *C.*:

This was an action by Gads-en to foreclose a mortgage made to him by George Thrush and wife. No controversy exists between the parties named. Certain other parties claimed liens on the mortgaged

premises. The decree established a first lien in favor of the First National Bank of Schuyler, a second in favor of the Schuyler national bank, a third in favor of the Nebraska State bank, and a fourth in favor of the plaintiff. The plaintiff and Thrush appeal, the plaintiff because the court awarded the First national bank priority over him, and Thrush complaining against the allowance of any lien to the First national bank, and also because, on a plea of usury by him interposed against the claim of the Schuyler national bank, the court declined to permit the remedy offered by the State law, but allowed the principal of the debt with a forfeiture only of unpaid interest.

We shall first consider the case as regards the First national bank. The lien awarded that bank as a senior lien arose out of a mortgage executed to J. C. Noyes. Noyes does not seem to have been originally a party, but filed an answer and a cross-petition, or such were filed on his behalf. Thereafter an order was made substituting the First National Bank for Noyes as a defendant, and no exception was taken to that order. The bank alleged the making and delivery to Noyes of the mortgage and notes secured thereby and then pleaded an assignment of the notes and mortgage to the bank. To this cross-petition alleging such facts Thrush made no answer, and so confessed the same. His appeal on this branch is disposed of by that fact. After, by suffering default, confessing the facts pleaded, he cannot take advantage of the proof made by other parties in support of issues by them joined.

The plaintiff answered the cross-petition, among other things, denying the averments of an assignment to the bank and pleading that Thrush had executed the notes and mortgage for the purpose of obtaining a loan from Noyes, and that Noyes had refused to accept the notes and mortgage. The evidence shows that Thrush was indebted, either to the First national bank or to Mr. Bryant, its cashier, in an amount almost equal to the amount of the mortgage. Bryant, desiring satisfaction of the debt, suggested to Thrush that probably Noyes would, on the real-estate security,
243 lend Thrush enough to discharge the debt. Noyes was an officer of the bank and is in the mortgage described as a citizen of Wisconsin. The notes and the mortgage were executed and handed to Bryant to complete the transaction. Bryant filed the mortgage for record, but Noyes on learning of the transaction repudiated it and refused to advance the money. The papers remained with Bryant. Bryant delivered the old notes to Thrush and paid him a small balance in money. This was entered on the books of the bank as a loan by the bank, and the bank seeks to enforce the mortgage as security therefor. It does not appear that Thrush knew that Noyes refused the loan, or that he was thereafter dealing with the bank. It is quite clear that Bryant, when Noyes refused to adopt the contract, assumed that the bank might adopt it and retain the security intended for Noyes. It is evident that there was never any legal delivery of either note or mortgage, or, if there was, that the consideration failed. They were executed for the specific purpose of securing a loan to be made by Noyes; their possession by

Bryant was only that he might act as an intermediary in completing the contract. There was no privity or semblance of privity between Thrush and the bank, and no intention of executing a mortgage to the bank or getting a loan from it. Without delivery to and acceptance by the mortgagee the mortgage never became operative. There is no evidence, of course, to support the averment of an assignment by Noyes to the bank. There was neither consensus nor execution of a contract, and the mortgage is void (Shirley *v.* Burch, 16 Ore., 83).

It is urged that the plaintiff is estopped by the terms of his own mortgage from contesting the validity of that in question. Estoppels generally must be pleaded, and this is not pleaded. But the facts create no estoppel. The cases enforcing estoppels against a junior mortgagee and in favor of an asserted claim prior in time are, it is believed, cases where, by recitals in the junior mortgage or by matters *in pais*, the validity of the senior is recognized. There is another class of cases, usually affecting vendees rather than incumbrancers, where a deduction from the consideration money has been made to compensate the senior lien, and where an equitable obligation arises to discharge it or permit its discharge regardless of its validity. The case before us does not fall within either principle. The mortgage was on the whole estate, and recognizes no particular lien. There is simply an exception from Thrush's covenant against incumbrances of "mortgages as now recorded in the county clerk's office of Dodge county, Nebraska." This simply relieved Thrush from any liability under his covenant on account of any then recorded mortgages, whether good or bad. It is very different from a stipulation in the mortgage whereby the mortgagee took his rights expressly subject to the claims of another, or where his mortgage attached only to the residue of the estate after satisfying a prior lien. The proof did not in any way support the averments of the cross-petition. It did not support those of plaintiff's answer thereto.

We now come to the lien of the Schuyler national bank.
244 Thrush was largely indebted to that bank. He obtained a further loan, and executed to the bank a note for five thousand dollars to represent the consolidated indebtedness. At the same time there was made a note for a like amount to William H. Sumner and a mortgage to Sumner to secure the latter note. Sumner was an officer of the bank. He had no individual dealings with Thrush, and the sole purpose of the note and mortgage to him was to secure the debt to the bank. Certain payments were made on the bank's note, so that when it came to foreclosure the bank claimed as due only $3,229. To the cross-petition of Sumner, in which the bank was permitted to join, Thrush pleaded usury. It was clearly shown that the transactions between Thrush and the bank were tainted with usury and the court so found. But the view was taken that, as the transaction was in effect with a national bank, the remedies afforded by the act of Congress in that behalf were exclusive, and that Thrush was not entitled to the benefit of the State laws whereby he might set off against the principal all payments made of interest. Accordingly there was allowed this bank its principal.

It is now firmly established that, as against a national bank, the remedies allowed by act of Congress in case of usury are exclusive, and that payments of usurious interest may not be set off in an action for the debt. But the case before us is complicated by the fact that the mortgage and note here in question were not made to the bank, but to an individual amenable to the State laws, who joins the bank in enforcing the security. We have been cited to no authority on the precise question thus presented, nor, in the course of an independent investigation necessarily somewhat cursory, have we discovered any. We think, however, that under the circumstances the bank is in no position to assert any privilege under the act of Congress.

The inference from the direct testimony and from the circumstances is that if the object of procuring the note and mortgage to be executed to Sumner was not to evade the penalties of the act of Congress with respect to usury, it was to evade the inhibition against the taking by a national bank of real-estate security for loans made at the time. Whether that inhibition applies to a case where a portion of the debt was pre-existent we need not inquire, because it is now settled that a violation of that enactment does not afford the debtor any ground of relief; the Government alone may complain. Still, whichever motive influenced the bank, the object was to evade the burdens attaching to its position as a national bank. It would be highly unconscionable to permit a person to give a contract a false form to evade the burdens which would follow from its true expression, and then permit him to show the truth as against the form to evade the burdens cast by a contract in the form which has been so chosen. It is said that Thrush might certainly have recovered the penalty denounced by Congress by an independent action within the period of limitations against the bank, and that therefore the transaction must be regarded as one within the act of
Congress. This does not follow. One may render himself
245 liable because of a false aspect he throws upon his transactions
and at the same time be thwarted in his effort to evade another liability, to evade which he had selected the false aspect. The terse headnote to Hayes *v.* People, 25 N. Y., 390, illustrates the principle: "A married man it seems, imagining himself to effect mere seduction, may blunder into bigamy."

The decree of the district court is reversed and the cause remanded, with directions to ascertain the amount of money advanced to Thrush by the Schuyler national bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any; to postpone the lien of the First national bank to that of the plaintiff, and for such further proceedings as may be necessary and not inconsistent with this opinion.

Reversed and remanded.

And afterward, to wit, on the 16th day of November, 1898, there was filed in the office of the clerk of said court a certain motion for rehearing in words and figures following, to wit:

In the Supreme Court of Nebraska.

JAMES GADSDEN, Plaintiff, *vs.* GEORGE THRUSH, MATTIE N. THRUSH, Nebraska State Bank, William H. Sumner, The Schuyler National Bank of Schuyler, Nebraska; Englebert Folda and Martha Folda, Administrators of the Estate of F. Folda, Deceased, Defendants.	No. 8315. Motion for Rehearing.

Now comes William H. Sumner, for and on behalf of The Schuyler National Bank of Schuyler, Nebraska, and the said Schuyler National Bank of Schuyler, Nebraska, defendants herein, and move the court for a rehearing of said cause, and for grounds of their motion say:

First. That said Schuyler national bank is an association incorporated under the laws of the Congress of the United States relating to national banks.

Second. That by the decision of this court the said Schuyler national bank has been denied a right secured to it by the laws of the United States relating to national banks, in this, to wit, that in said decision the provisions of the law of the State of Nebraska relating to interest and providing a penalty for usury have been declared against said Schuyler national bank and embodied in said decision; that said decision is erroneous because the penalties provided in sections 5197 and 5198 of the Revised Statutes of the United States are exclusive, and they only can be enforced against said Schuyler national bank, because it is fully shown in the pleadings, proof, and record that the transaction in suit between said Schuyler national bank and the defendant George Thrush arises solely from
246 moneys loaned on its own account by said Schuyler national bank to said George Thrush, and interest paid thereon by said George Thrush to said Schuyler national bank, between whom the decision complained of was made.

Third. The defendant George Thrush, in his answer to the Schuyler national bank's cross-petition, fully acknowledges the transaction involved to be a loaning of money by said bank to him, and sets out the items of interest by him paid, always, to the said Schuyler national bank, acknowledging that the note and mortgage to William H. Sumner were collateral to the debt due the said bank, but in his prayer for relief asks to have the amounts of interest so paid deducted from the principal sum loaned, which this court, by its decision complained of, orders done, which decision denies said Schuyler national bank its rights secured by the laws of Congress relating to national banks, imposing upon said national bank the penalties of the usury laws of the State of Nebraska, which do not apply to national banks, and ought not to be imposed in this suit between the said Schuyler national bank and the said George Thrush.

Fourth. The decision is based upon the error of the court in as-

suming, in the opinion, that the note and mortgage to William H. Sumner were made with intent "to evade the inhibition against the taking by a national bank of real-estate security for loans made at the time," whereas the fact is fully shown, in Johnson's testimony, that no such interest existed, and the reason for taking the security given was sufficiently shown. The mortgage was not taken wholly for money then loaned, but largely for a debt past due.

Fifth. The naming of William H. Sumner as a mortgagee was not done with intent to in any way deceive or defraud said George Thrush, nor in any way did or could it effect his liability or the right of the bank to foreclose the mortgage.

Sixth. In no pleading in said case does the defendant George Thrush plead the estoppel upon which the decision would seem to be based.

C. J. PHELPS,
Attorney for William H. Sumner and the Schuyler National Bank of Schuyler, Nebraska.

Endorsed: 8315. In the supreme court of the State of Nebraska. James Gadsden *v.* Geo. Thrush *et al.* Motion for rehearing. Supreme court of Nebraska. Filed Nov. 16, 1898. D. A. Campbell, clerk. C. J. Phelps, att'y for Schuyler National Bank.

And afterward, to wit, on the 12th day of December, 1898, there was filed in the office of the clerk of said court a certain motion for rehearing in words and figures following, to wit:

247 In the Supreme Court of the State of Nebraska.

JAMES GADSDEN, Plaintiff, *vs.* GEORGE THRUSH ET AL., Defendants.	No. 8315. Motion by the First National Bank of Schuyler, Nebraska, for a Rehearing.

Comes now the defendant and appellee The First Nation- Bank of Schuyler, Nebraska, and moves the court to grant a rehearing herein for the reasons following, to wit:

First. The court has misunderstood, misconstrued, and misconceived the evidence relative to the execution and the delivery of the Noyes mortgage.

Second. The trial court found generally that the so called Noyes mortgage was made and delivered to the First national bank, and there is evidence to sustain such finding; hence it should not have been disturbed.

Third. The proofs, all considered, justify the finding that the mortgage was made and delivered to the First national bank to secure a debt due from Thrush to the bank, and the judgment of the trial court should have been affirmed.

Fourth. The judgment of this court postpones this appellee's lien to that of plaintiff and leaves undisturbed the judgment of the trial court finding said lien prior and superior to the liens of the Nebraska

State bank and the Schuyler national bank, which liens are both prior and superior to that of plaintiff.

GEO. H. THOMAS,
B.
Attorney for the First National Bank of Schuyler, Nebraska.

Endorsed: 8315. Supreme court, State of Nebraska. James Gadsden, plaintiff, *vs.* George Thrush *et al.*, defendants. Motion for rehearing. Supreme court of Nebraska. Filed Dec. 12, 1898. D. A. Campbell, clerk. Geo. H. Thomas, att'y for First Nat. Bank of Schuyler, Nebr.

And afterward, to wit, on the 20th day of December, 1898, there was filed in the office of the clerk of said court a certain stipulation in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

JAMES GADSDEN, Plaintiff,
vs.
GEORGE THRUSH ET AL., Defendants. } Stipulation.

It is hereby stipulated and agreed that the First National Bank of Schuyler, Nebraska, shall have until December 31st, 1898, to prepare, serve, and file briefs on motion for rehearing herein, and
248 the failure to accompany said motion with printed brief is hereby waived. Plaintiff signs this as not asking or seeking to control the action of the court.

Dated Dec. 16th, 1898.

F. DOLEZAL,
Attorney for James Gadsden.
GEO. H. THOMAS,
Attorney for 1st Nat. Bank.

Endorsed: 8315. In the supreme court of the State of Nebraska. James Gadsden, plaintiff, *vs.* George Thrush *et al.*, defendants. Stipulation. Supreme court of Nebraska. Filed Dec. 20, 1898. D. A. Campbell, clerk. Geo. H. Thomas, att'y for 1st National Bank of Schuyler, Neb.

And afterward, to wit, on the 5th day of January, 1899, there were rendered by said court and entered of record two certain orders in words and figures following, to wit:

JAMES GADSDEN, Appellant,
v.
GEO. THRUSH ET AL., Appellees. } No. 8315. Appeal from the District Court of Dodge County.

This cause came on to be heard upon a motion by the appellee The First National Bank of Schuyler, Nebraska, for a rehearing; on consideration whereof it is by the court ordered that said motion be, and the same hereby is, overruled.

JAMES GADSDEN, Appellant,
v.
GEORGE THRUSH ET AL., Appellees.
} No. 8315. Appeal from the District Court of Dodge County.

This cause came on to be heard upon a motion by the appellee The Schuyler National Bank of Schuyler, Nebraska, for a rehearing; on consideration whereof it is by the court ordered that said motion be, and the same hereby is, sustained, and a rehearing as to said appellee is hereby granted.

And afterward, to wit, on the 22nd day of March, 1899, there was rendered by the court and entered of record a certain judgment in words and figures following, to wit:

249 JAMES GADSDEN, Appellant,
vs.
GEO. THRUSH, CHARLES THRUSH, SR., Mattie N. Thrush, Englebert Folda and Margaret Folda, Administrators of the Estate of Frank Folda, Deceased; Wm. H. Sumner, and The Nebraska State Bank of Schuyler, Nebraska; J. C. Noyes, The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, Appellees.
} No. 8315. Appeal from the District Court of Dodge County. Judgment of Reversal.

This cause came on to be heard upon a rehearing of the decision and judgment heretofore entered herein by this court on November 3, 1898, was taken up and argued by counsel and submitted to the court; on consideration whereof the court finds that there is no error in its former proceedings and judgment of said date in this case. It is therefore considered by the court that the judgment heretofore rendered herein on November 3, 1898, be adhered to, and that the order therein prescribed should govern the further proceedings in this case, and that the judgment of the district court be reversed and the cause remanded, with directions to ascertain the amount of money advanced to Thrush by the Schuyler national bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any; to postpone the lien of the First national bank to that of the plaintiff, and for such further proceedings as may be necessary and not inconsistent with the opinion of the supreme court filed herein; and that the appellant recover from the appellees his costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 22nd day of March, 1899, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

Opinion. Filed Mar. 22, 1899.

JAMES GADSDEN
vs.
GEORGE THRUSH ET AL. } No. 8315.

1. The exemption of national banks from the penalties of usury prescribed by a statute of the State owes its existence to laws enacted by Congress, and such exemption should not, by implication, be extended beyond the import of the Federal statute.

2. In an action to foreclose a mortgage securing a note made to be used as collateral to a note owing to a national bank, the mere fact that the proceeds of such collateral, when collected by the payee thereof, are to be used to discharge the said principal note to the bank, does not justify the extension of the Federal exemp-
250 tions of national banks from penalties for usury to such foreclosure proceedings.

RYAN, *C.*:

In this case a rehearing was granted the appellees William H. Sumner and The Schuyler National Bank. The opinion originally filed is reported in 76 N. W. Rep., 1061, and therein will be found a general description of the relation of the parties and the pleadings filed by each. The present inquiry is with relation to the issues under which Sumner and the Schuyler national bank seek relief, and accordingly we shall confine ourselves to the pleadings wherewith these parties are concerned.

In his cross-petition William H. Sumner alleged that on August 8, 1890, the defendant- George Thrush and Charles Thrush were indebted to the Schuyler national bank in the sum of $5,000, evidenced by their promissory note to said bank; that said note was renewed from time to time, and on March 31, 1894 there remained due the sum of $3,229 for which amount George Thrush gave his promissory note to the bank, due 180 days after its date, and that no part of this note had been paid. It was further alleged by Sumner on August 8, 1890, George Thrush and Mattie Thrush executed to him their promissory note for the sum of $5,000, due 2 years after date, with ten per cent. interest per annum, payable annually, and that to secure the said note the makers of said note made a mortgage on certain described real property, which said mortgage was duly filed for record. In his said cross-petition, William H. Sumner made the following averments: "This defendant further alleges that the note and mortgage so as aforesaid executed and delivered by the defendants George Thrush and Mattie Thrush were executed and delivered to him, as trustee, for the use and benefit of the Schuyler national bank and to secure the indebtedness of said Thrush to said bank; that said debt so secured on the 8th day of August, 1890, by said mortgage deed was a debt previously contracted; that said mortgage was made in good faith and in the name of this defendant for the benefit of said Schuyler national bank. No proceedings at law

have been had for the recovery of the debt secured by said mortgage or any part thereof, and there is now due from the defendant George Thrush and Mattie N. Thrush to this defendant, for the use and benefit of the Schuyler national bank, the sum of $3,229.00 and interest, at ten per cent., from September 27, 1894." The prayer of the petition of Sumner was that an account might be taken of the amount due on said note and mortgage; that the priority of liens might be determined and the lien of other defendants declared inferior to that of Sumner, and that said George Thrush and Mattie N. Thrush might be foreclosed of all equity of redemption or other interest in the premises mortgaged; that said premises might be sold according to law and out of the proceeds thereof that the lienholders might be paid the amount adjudged to be due them in the order of their priority; that the defendants George Thrush and Mattie Thrush might be adjudged to pay any deficiency which might remain
251 after applying the proceeds of said sale to the payment of said debts and for such other relief as might be just and equitable. Later, the Schuyler National Bank was allowed to become a party to the litigation and filed a cross-petition, alleging substantially the same facts, and on behalf of itself and Sumner praying like relief with that above described as the prayer of Sumner.

The defendants George Thrush and Mattie N. Thrush in separate answers admitted the making of the promissory note for $5,000, and of the mortgage securing the same on August 8, 1890, but denied every other allegation of the petition of Sumner. In addition, they averred that said note and mortgage were made to Sumner as part of a usurious transaction; that the same were held by Sumner as collateral security to usurious loans from time to time renewed at usurious rates, as in the answer more particularly described. Each successive usurious loan at 12 per cent. per annum interest was described in a distinct paragraph, and these paragraphs were 24 in number. The first paragraph described a loan on August 9, 1889, and the twenty-fourth paragraph described the history of the note of $3,229 of date March 31, 1894. There was, therefore, a continuous chain of usurious transactions extending over the entire period between August 9, 1889, and March 31, 1894, and the relief sought was the application of the payments of interest on the sum in satisfaction of which the foreclosure was prayed. By reply Sumner denied the averments of the eleventh paragraph of the answer of each of the defendants Thrush, and the other paragraphs of his reply, substituting the appropriate figures to express the proper number referred to in each instance, were as follows: "That the interest payment mentioned in paragraph 10 of said answer was made to the Schuyler national bank more than two years before the commencement of this action, and the consideration thereof in this action is barred by law." The reply of Sumner closed with this language: "He further says this court has no jurisdiction in this action to consider the questions raised in said answer as to each and every item of interest mentioned in said answer as paid to said Schuyler national bank; that said items are not proper items to set off or counter-claim, and cannot be adjudicated except in a suit brought expressly for that purpose under the pro-

visions of section 5198 of the Revised Statutes of the United States." On the trial there was a decree of foreclosure in which there was a finding of usury in the note of $3,229 to the amount of $229, and the defendants George Thrush and Mattie N. Thrush were denied their costs. In other words, the district court held that the statute of limitations and costs were governed by the Federal statute relating to national banks and not by section 5, chapter 44, of the Compiled Statutes of Nebraska. The correctness of this ruling is the question presented by this appeal.

In the former opinion it was pointed out that the taking of real-estate security for the loan of money constitutes no defense to a foreclosure, hence the citation of authorities on behalf of the bank to that proposition was not necessary. It was further pointed out in
252 that opinion that the Government might complain, and upon this proposition it is notic-able that the bank has cited no authorities and has made no argument. There was in view of the last consideration named an incentive to the bank to take the security upon real property as it did in this instance, so that it might appear upon the face of the note and mortgage that the bank originally had not been a party thereto, if the governmental authorities should insist upon a strict compliance with the provisions of the Federal statute forbidding the taking of a real-estate mortgage except in certain cases in which that under consideration is not included.

In Norfolk National Bank *v.* Schwenk, 46 Neb., 381, Norval, C. J., quoted, as of binding force upon this court, the following language of Swayne, J., in Farmers' & Merchants' National Bank *v.* Dearing, 1 Otto (U. S.), 29: "The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. * * * In the complex system of polity which obtains in this country the powers of government may be divided into four classes: those which belong exclusively to the States, those which belong exclusively to the National Government, those which may be exercised concurrently and independently by both, and those which may be exercised by the States, but only with the consent, express or implied, of Congress. Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. * * * It must always be borne in mind that the Constitution of the United States 'and the laws which shall be made in pursuance thereof' are 'the supreme law of the land' (Const., art. 6), and that this law is as much a part of the law of each State and as binding upon its authorities and people as its own local constitution and laws. In any view that can be taken of the thirtieth section (Revised Statutes, 5198), the power to supplement it by State legislation is conferred neither expressly nor by implication, there

being nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the State where the bank is situated, but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of Congress." Conformably with the doctrine above announced, it was held in Norfolk National Bank v. Schwenk, *supra*, that a national bank is not liable to the penalties imposed by the usury laws of the State. We are now asked to go a step further and hold in a suit to foreclose a mortgage securing a note made to
253 and held by an individual in trust for the payment of a note owing to the bank that the provisions of section 5198, Revised Statutes, are applicable to the exclusion of the statute of this State with reference to usury. The cross-petition of Sumner, in effect, was for the foreclosure of a mortgage of which the proceeds were to be applied in payment of a note made to the bank. The principal note was not sued upon. It was referred to only as showing how much was required to be realized in the foreclosure suit. The answers of each of the defendants Thrush showed that by reason of usury but little, if anything, was required to be realized from the foreclosure proceedings to satisfy what was due from George Thrush to the bank. It was not a suit in any sense upon the note which George Thrush had given the bank. That was his individual note. The note secured by mortgage was signed by Mattie N. Thrush, who owed nothing to the bank. She did not merely sign the mortgage to release her dower right, but she signed the note as one of its makers. In case of a deficiency by sale of the mortgaged property she was individually liable, as it is now claimed, not to Sumner, but to the Schuyler national bank, to which she was not indebted and had never agreed to pay a single cent. To her answer setting up payments of usurious interest which would release her from individual liability there was a reply, which, in effect, conceded the usury charged to have been contracted for and exacted in twenty-three instances, but sought to avoid the credits to which, under the State law, she would have been entitled by invoking the Federal statute enacted for the protection of national banks as governmental instrumentalities. It is provided in section 5, chapter 44, Compiled Statutes of Nebraska, that: "If a greater rate of interest than is hereinbefore allowed shall be contracted for, received, or reserved, the contract shall not therefore be void; but if, in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon judgment shall be for the principal, deducting interest paid." Sumner himself put in issue the amount which he was entitled to collect for the payment of the note made by George Thrush to the bank. By the answers and replies there was alleged and practically admitted the right to credits by reason of payments of usury by George Thrush on his indebtedness to the bank. It is now insisted, how-

ever that the trustee should stand for the bank, and, in equity, that he is entitled to the same rights and exemptions from liabilities as are conferred by Federal statute upon the governmental instrument referred to by Judge Swayne in Bank *v.* Dearing, *supra*. There is no just reason for resorting to strained constructions to avoid the penalties of the statute of this State. As between these litigants we are not measuring equities. The withdrawal of this case from the operation of our statute, as indicated Judge Swayne, must be sanctioned by some express provision of the Federal statute. Section 5198, Revised Statutes of the United States, contains the following language: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceeding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred." Under the above section the forfeiture of the entire interest is of that which the note, bill, or other evidence of debt sued upon carries with it or which has been agreed to be paid thereon. In the case at bar the recovery by foreclosure was sought upon the note given by George and Mattie N. Thrush to William H. Sumner. There was no issue of usury on that note. It was concededly held by Sumner for a certain purpose—that is, to be collected and the proceeds paid over on a note greatly reduced if not discharged. To the foreclosure proceedings by Sumner in which the bank joined, the Federal statute was inapplicable, first, for the reason that the note secured by mortgage was not the note upon which usurious interest was agreed to be paid; and, second, the note and mortgage are held by Sumner and a foreclosure is sought by him. The bank, when it became a party, simply urged that the same relief prayed by Sumner should be granted. The rule is that the State statutes govern proceedings in the courts of the State unless the Federal statute with reference to a proper subject-matter prescribes a modification. It may be conceded that the interests of the General Government requires that it should take special care of national banks, but the Federal Government must by clear provisions assert its authority. There is no good reason why State courts should extend the operation of statutes affecting merely the remedy beyond the clear import of the language of Congress, and there is no precedent for this that we have been able to find. If the bank had been one organized in the State of Illinois, Sumner would not have been permitted to commence his action of foreclosure in a Federal court upon showing the conditions disclosed by the record in this case. No citation of authorities is necessary to demonstrate this proposition, and the reason of the rule is that the Federal statute prescribes what parties have a standing to begin suits in the Federal courts and none other can. There is no en-

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largement of rights possible upon mere equitable grounds in such cases and there should not be in this. For the reasons given we think the former opinion should be adhered to and *and* the order therein prescribed should govern the further proceedings in this case.

Reversed and remanded.

And afterward, to wit, on the 19th day of April, there was rendered by said court and entered of record a certain order in words and figures following, to wit:

255 JAMES GADSDEN, Appellant, v. GEORGE THRUSH ET AL., Appellee. } No. 8315. Appeal from the District Court of Dodge County.

This cause came on to be heard upon a motion by the appellee The Schuyler National Bank to modify the decree heretofore rendered herein on the 3rd day of November, 1898; on consideration whereof it is ordered by the court that said motion be, and the same hereby is, overruled.

And afterward, to-wit, on July 10, 1899, there was filed in the office of the clerk of said Supreme Court a petition for a writ of error in words and figures following, to-wit:

256 To the Honorable Henry B. Brown, justice of the Supreme Court of the United States:

Your petitioners, The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, jointly, for the benefit of the said Schuyler national bank, respectfully show to your honor:

First. A final judgment was rendered in the supreme court of the State of Nebraska, being the highest court of the State in which a decision in the suit could be had, on the 22nd day of March, A. D. 1899, in a suit wherein The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner were joined as appelle-s and cross-petitioners for the benefit of said Schuyler national bank and against George Thrush, defendant and appellant, by which judgment a decree in favor of said Schuyler national bank, finding $3,000.00 due to said Schuyler national bank from said George Thrush and ordering the sale of his certain real estate described in the mortgage in said suit foreclosed, was reversed.

Second. This action was commenced in the district court of Dodge county, Nebraska, by James Gadsden against said George Thrush and others, including said William H. Sumner, who filed a cross-petition and was joined by permission obtained from said district court by the said Schuyler national bank, for whose benefit said William H. Sumner's petition was originally filed, and said

257 Schuyler national bank's petition was identical in the averments and prayer with said William H. Sumner's petition, jointly pleading the organization of said bank under the laws of the Congress of the United States relating to national banks, and setting

up a real-estate mortgage indebtedness due from said George Thrush to said Schuyler national bank, and, in reply to the answer of said George Thrush alleging usury under the laws of Nebraska and praying the relief provided by the Nebraska statute, your petitioners pleaded the bar of the Federal statute and the Schuyler national bank's right, privileges, and the exemption secured by sections 5197 and 5198 of the Revised Statutes of the United States.

By the consideration of said district court a decree and judgment therein was rendered for said Schuyler national bank from said George Thrush — the sum of $3,000.00 and ordering the sale of the real estate described in the mortgage aforesaid to satisfy said indebtedness of $3,000.00.

The said George Thrush appealed said cause to the supreme court of Nebraska, and subsequently the same came on for argument and final hearing in said supreme court, and thereupon, on consideration, the supreme court of Nebraska reversed the decision of said district court of Dodge county and ordered the deduction of all interest paid on said mortgage indebtedness by said George Thrush to said Schuyler national bank, and thereby applied the penalty provided by the usury laws of Nebraska against said Schuyler national bank and against the rights of said Schuyler national bank to exemption from the penalties prescribed by the usury laws of Nebraska secured to said Schuyler national bank by the laws of the United States.

And your petitioners thereupon filed in said supreme court a motion for a rehearing of said cause, alleging that by said decision of said supreme court said Schuyler national bank had been denied a right secured to said bank by the laws of the United States relating to national banks. A rehearing was granted, and your petitioners urged the rights of said Schuyler national bank under the laws of the United States, alleging that it had been denied its rights, privileges, and exemption thereunder.

But the final judgment herein complained of, reversing the decision of said district court and entering one in favor of said Schuyler national bank, reducing the amount from $3,000 to the sum of about $884.00, but against said Schuyler national bank, upon its just claim to the full amount found due by said district court of Dodge county in the sum of $3,000.00 and legal interest, at the rate of seven per cent. per annum, from the date of said judgment in said district court, and against said Schuyler national bank's rights to exemption from the penalties denounced by the laws of Nebraska, as will appear from the opinion of the court attached to the record here presented with this application for the inspection of the court.

Wherefore your petitioners pray for the allowance of a writ of error by the Supreme Court of the United States and such
258 other process as will enable the petitioners to obtain a review of the case and a correction of the errors alleged.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, &
WILLIAM H. SUMNER,
By C. J. PHELPS, *Their Attorney.*

June 28, 1899.—Let the writ of error be issued.

H. B. BROWN,
Asso. Justice Sup. Ct.

(Endorsed:) 8315. Gadsden *v.* Thrush. Petition for writ of error. Supreme court of Nebraska. Filed Jul- 10, 1899. D. A. Campbell, clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Gadsden, appellant, and George Thrush, Charles Thrush, Sr., Mattie N. Thrush, Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased; William H. Sumner, The Nebraska State Bank of Schuyler, Nebraska; J. C. Noyes, The First National Bank of Schuyler, Nebraska, and The Schuyler National Bank of Schuyler, Nebraska, appellees, No. 8315, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,
259 so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) 8315. Gadsden *v.* Thrush. Writ of error. Supreme court of Nebraska. Filed Jul- 10, 1899. D. A. Campbell, clerk.

THE STATE OF NEBRASKA, *ss:*

In obedience to the commands of the within writ, I, D. A. Campbell, clerk of the supreme court of said State, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to wit, petition for writ of error, writ of error, assignment of error, copy of bond, citation, and acknowledgment of service.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 20th day of July, A. D. 1899.

D. A. CAMPBELL,
Clerk of the Supreme Court.

In the Supreme Court of the United States.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, Nebraska, and William H. Sumner, Plaintiffs in Error,
vs.
JAMES GADSDEN, GEORGE THRUSH, MATTIE Thrush, and The Nebraska State Bank of Schuyler, Nebraska.
} Assignment of Error.

The plaintiffs in error assign and set forth the following assignment of errors, which they intend to assert and urge upon the hearing of this action in the Supreme Court of the United States:

First. That by the decision of the supreme court of Nebraska the said Schuyler national bank, an association incorporated under
260 the laws of the Congress of the United States relating to national banks has been denied a right secured to it by the laws of the United States relating to national banks, in this, to wit: That in said decision the provisions of the law of the State of Nebraska relating to interest and providing a penalty for usury have been declared against said Schuyler national bank and embodied in said decision.

Second. That said decision is erroneous because the penalties provided in sections 5197 and 5198 of the Revised Statutes of the United States are exclusive, and they only can be enforced against said Schuyler national bank, because it is fully shown in the pleadings, proof, and record that the transaction in suit between said Schuyler national bank and the defendant George Thrush arose solely from moneys loaned on its own account by said Schuyler national bank to said George Thrush and interest paid thereon by said George Thrush to said Schuyler national bank, between whom the decision complained of was made.

Third. The defendant George Thrush, in his answer to the Schuyler nationals — cross-petition, fully acknowledges the transaction involved to be a loaning of money by said Schuyler national bank to him, and sets out the items of interest by him paid, always to the said Schuyler national bank, acknowledging that the note and mortgage to said William H. Sumner were collateral to the debt due the said Schuyler national bank, but in his prayer for relief asked to have the amounts of interest so paid deducted from the principal sum loaned, under the provisions of the law of Nebraska, which said supreme court of Nebraska, overruling the trial court, by its decision complained of ordered done, which decision denies said Schuyler national bank its rights secured by the laws of Congress relating to national banks, imposing upon said Schuyler national bank the penalties of the usury laws of Nebraska, which do not apply to national banks, and are erroneously imposed in this suit between said Schuyler national bank and said George Thrush.

Fourth. The decision complained of is based upon the error of the court in assuming that the note and mortgage to William H. Sumner were made with intent "to evade the inhibition against the taking by a national bank of real-estate security for loans made at the time," whereas there is not the slighest evidence to support such an inference, and the exact opposite fully appears in the record, and that it was not wholly for money loaned at the time, but prior thereto to a large amount.

Fifth. The court erred in assuming that the naming of William H. Sumner as a mortgagee was done with intent to deceive or defraud said George Thrush, and there is no evidence to sustain such a finding.

Sixth. The court erred in holding the Schuyler national bank estopped, because there was no estoppel pleaded and there was no evidence whatever to support any ground or finding of estoppel.

C. J. PHELPS,
Attorney for Plaintiffs in Error.

261 (Endorsed:) 8315. In the Supreme Court of the United States. The Schuyler National Bank *et al. v.* Geo. Thrush *et al.* Assignment of error. Supreme court of Nebraska. Filed Jul- 19, 1899. D. A. Campbell, clerk.

Know all men by these presents that we, The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, as principals, and J. S. Johnson and M. D. Cameron, as sureties, are held and firmly bound unto George Thrush, Mattie Thrush, James Gadsden, and The Nebraska State Bank of Schuyler, Nebraska, in the full and just sum of six thousand dollars, to be paid to the said George Thrush, Mattie Thrush, James Gadsden, and The Nebraska State Bank of Schuyler, Nebraska, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a session of the January term, 1899, of the supreme court of the State of Nebraska, in a suit depending in said court between James Gadsden, plaintiff, and George Thrush, Mattie Thrush, The Nebraska State Bank of Schuyler, Nebraska; William H. Sumner, The Schuyler National Bank of Schuyler, Nebraska, a judgment was rendered against the said Schuyler National Bank and William H. Sumner and in favor of said George Thrush and Mattie Thrush, and the said William H. Sumner and the Schuyler National Bank of Schuyler, Nebraska, appealing therefrom to the Supreme Court of the United States, and having obtained a record and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George Thrush and Mattie Thrush, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SCHUYLER NATIONAL BANK AND
WILLIAM H. SUMNER,
By C. J. PHELPS, [L. S.]
Their Attorney.
J. S. JOHNSON. [SEAL.]
M. D. CAMERON. [SEAL.]

Sealed and delivered in presence of—
J. E. ARNOLD.

Approved by—
W. H. MUNGER,
U. S. District Judge, Dist. of Neb.
H. B. BROWN, *Asso. Just.*

262 Endorsed: 8315. Gadsden *v.* Thrush. Bond. Supreme court of Nebraska. Filed Jul- 10, 1899. D. A. Campbell, clerk.

UNITED STATES OF AMERICA, *ss:*

To James Gadsden, George Thrush, Mattie Thrush, and The Nebraska State Bank of Schuyler, Nebraska, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

The undersigned, defendants in error in the within-entitled cause, hereby acknowledge service, duly made, of the within citation on each of us this 8th day of July, 1899.

JAMES GADSDEN,
GEORGE THRUSH, AND
MATTIE THRUSH,
By F. DOLEZAL, *Their Attorney.*
THE NEBRASKA STATE BANK OF SCHUYLER, NEBRASKA,
By J. A. GRIMISON, *Its Attorney.*

(Endorsed:) 8315. James Gadsden, appellant, *v* George Thrush *et al.*, appellees. Citation and acknowledgment of service. Supreme court of Nebraska. Filed Jul- 17, 1899. D. A. Campbell, clerk.

263 And afterward, to-wit, on the 9th day of August, 1901, there was filed in the office of the clerk of said supreme court of Nebraska, a mandate of the Supreme Court of the United States, in words and figures following, to-wit:

264 The President of the United States of America to the honorable the judges of the supreme court of the State of Ne-
[SEAL.] braska, Greeting:

Whereas, lately in the supreme court of the State of Nebraska, before you, or some of you, in a cause between James Gads-en, appellant, and George Thrush, Charles Thrush, Sr., Mattie N. Thrush, Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased, William A. Sumner, The Nebraska State Bank of Schuyler, Nebraska, J. C. Noyes, The First National Bank

of Schuyler, Nebraska appellees, No. 8315, wherein the judgment of the said supreme court, entered in said cause on the 22nd day of March, A. D. 1899, was in favor of the said James Gads-en, George Thrush, Mattie Thrush, and The Nebraska State Bank of Schuyler, Nebraska and against the said Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, as by the inspection of the transcript of the record of the said supreme court which was brought into the Supreme Court of the United States by virtue of a writ of error sued out by The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the Supreme Court of the United States on said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby, dismissed for the want of jurisdiction.

November 19, 1900.

265 And the same is hereby remanded to you the said judges of the said supreme court of the State of Nebraska, in order that such proceedings may be had in said cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of August, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) Supreme Court of the United States, No. 11, October term, 1900. The Schuyler Nat'l Bank of Schuyler, Neb., *et al. vs.* James Gadsden, *et al.* Mandate. Supreme court of Nebraska, Filed Aug. 9 1901 Lee Herdman clerk.

266 In the Supreme Court of the State of Nebraska.

STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings in said supreme court in an action therein lately pending on appeal from the district court of Dodge county, Nebraska, wherein James Gadsden, Geo. Thrush, Charles Thrush, Sr. and Mattie N. Thrush were appellees, impleaded with Englebert Folda, *et al.*, impleaded with William H. Sumner, appellant, and The Nebraska State Bank of Schuyler, Nebraska, and The First National Bank of Schuyler, appellees, and The Schuyler National Bank, of Schuyler, Nebraska, appellant, being cause No. 12533, in said supreme court, in which a

judgment of affirmance was rendered by said supreme court on the 19th day of February, 1902, as recited in this transcript, as fully as all of the same remains on file and of record in my office; and I further certify that the matter following the transcript of said record and proceedings in the cause numbered 12533, and hereinbefore set out, is a true and perfect transcript of the following named portions of the record and proceedings in an action lately pending in said supreme court of Nebraska on appeal from the district court of Dodge county wherein James Gadsden was appellant and Geo. Thrush, *et al.* were appellees, and said cause in said supreme court was numbered eight thousand three hundred and fifteen, and wherein a judgment of reversal was rendered and entered of record on the 3rd day of November, 1898. Notice of appeal, with service and return, together with all endorsements thereon; judgment rendered by said supreme court in said cause, No. 8315, on November 3, 1898; opinion filed in said cause
267 by said supreme court; on November 3, 1898; 2 motions for rehearing filed in said cause, together with all endorsements thereon; stipulation, with endorsements thereon; two orders by said supreme court on said motion for rehearing, which said orders were rendered on the 5th day of January, 1899; judgment rendered by said supreme court in said cause on the 22nd day of March, 1899; opinion filed by said supreme court in the said cause on the 22nd day of March, 1899; judgment rendered by said supreme court in said cause on the 19th day of April, 1899; petition for writ of error & writ of error filed in said cause in the office of the clerk of said supreme court July 10, 1899; return on said writ of error; assignments of error filed in said cause in the office of the clerk of said supreme court on July 19, 1899; bond filed in said office of said clerk of the supreme court of Nebraska July 10, 1899; citation with acknowledgement of service thereon, filed in the office of the clerk of said supreme court on July 17, 1899; and mandate of the Supreme Court of the United States filed, in said cause in the office of the said clerk of the said supreme court on August 9, 1901, as all of the same are on file and of record in my said office.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court at the city of Lincoln, this 27th day of March, 1902.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk of the Supreme Court of Nebraska.
By E. W. NELSON, *Deputy.*

268 In the Supreme Court of the United States.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, Nebraska, and William H. Sumner, Plaintiffs in Error.

vs.

JAMES GADSDEN, GEORGE THRUSH, MATTIE THRUSH, and The Nebraska State Bank of Schuyler, Nebraska.

Assignment of Error.

The plaintiffs in error assign and set forth the following assignment of errors, which they intend to assert and urge upon the hearing of this action in the Supreme Court of the United States:

First. That by the decision of the supreme court of Nebraska, the said Schuyler national bank, an association incorporated under the laws of the Congress of the United States, relating to national banks, has been denied a right secured to it by the laws of the United States, relating to national banks, in this, to-wit: That in said decision the provisions of the law of the State of Nebraska, relating to interest and providing a penalty for usury, have been declared against said Schuyler national bank and embodied in said decision.

Second. That said decision is erroneous because the penalties, provided in sections 5197 and 5198 of the Revised Statutes of the United States, are exclusive, and they only can be enforced against said Schuyler national bank, because it is fully shown in the pleadings, proof and record that the transaction in suit between
269 said Schuyler national bank and the defendant, George Thrush, arose solely from moneys loaned on its own account by said Schuyler national bank to said George Thrush, and interest paid thereon by said George Thrush to said Schuyler national bank, between whom the decision complained of was made.

Third. The defendant George Thrush, in his answer to the Schuyler national —s cross petition, fully acknowledges the transaction involved to be a loaning of money by said Schuyler national bank to him, and sets out the items of interest by him paid, always to the said Schuyler national bank, acknowledging that the note and mortgage to said William H. Sumner were collateral to the debt due the said Schuyler national bank, but in his prayer for relief asked to have the amounts of interest so paid deducted from the principal sum loaned, under the provisions of the law of Nebraska, which said supreme court of Nebraska, overruling the trial court, by its decision complained of, did. Which decision denies said Schuyler national bank its rights secured by the laws of Congress, relating to national banks, imposing upon said Schuyler national bank the penalties of the usury laws of Nebraska, which do not apply to national banks, and are erroneously imposed in this suit between said Schuyler national bank and said George Thrush.

Fourth. The decision complained of is based upon the error of the court in assuming that the note and mortgage to William H.

Sumner were made with intent "to evade the inhibition against the taking by a national bank of real estate security for loans made at the time," whereas there is not the slightest evidence to sup-
270 port such an inference, and the exact opposite fully appears in the record, and that it was not wholly for money loaned at the time, but prior thereto to a large amount.

Fifth. The court erred in assuming that the naming of William H. Sumner as a mortgagee, was done with intent to deceive or defraud said George T. Thrush, and there is no evidence to sustain such a finding.

Sixth. The court erred in holding the Schuyler national bank estopped, because there was no estoppel pleaded, and there was no evidence whatever to support any ground or finding of estoppel.

C. J. PHELPS,
Attorney for Plaintiffs in Error.

(Endorsed:) No. 12533. Gadsden *v.* Thrush. Assignments of error. Supreme court of Nebraska Filed Apr. 1 1902. Lee Herdman, clerk.

271 To the Honorable John J. Sullivan, chief justice of the supreme court of the State of Nebraska:

Your petitioner, The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, jointly, for the benefit of the said Schuyler national bank, respectfully show to your honor:

First. A final judgment was rendered in the supreme court of the State of Nebraska, being the highest court of the State in which a decision in the suit could be had, on the 19th day of February, A. D., 1902, in a suit wherein The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner were joined as appellees, and cross petitioners for the benefit of said Schuyler national bank, and against George Thrush defendant and appellant, by which judgment, a decree in favor of said Schuyler national bank, finding $3000.00 due to said Schuyler national bank, from said George Thrush, and ordering the sale of his certain real estate described in the mortgage in said suit foreclosed, was reversed.

Second. This action was commenced in the district court of Dodge county, Nebraska, by James Gadsden, against said George Thrush and others, including said William H. Sumner, who filed a cross petition and was joined by permission obtained from said district court by the said Schuyler national bank for whose benefit said William H. Sumner's petition was originally filed, and said Schuyler national bank's petition was identical in the averments
272 and prayer with said William H. Sumner's petition, jointly pleading the organization of said bank under the laws of the Congress of the United States relating to national banks, and setting up a real estate mortgage indebtedness due from said George Thrush to said Schuyler national bank, and in reply to the answer of said George Thrush alleging usury under the statute and law of Nebraska, your petitioners pleaded the bar of the Federal statute,

and the Schuyler national bank's rights, privileges and the exemptions secured by sections 5197 and 5198 of the Revised Statutes of the United States.

By the consideration of said district court, a decree and judgment therein was rendered for said Schuyler national bank, from said George Thrush in the sum of $3000.00 and ordering the sale of the real estate described in the mortgage aforesaid to satisfy said indebtedness of $3000.00.

The said George Thrush appealed said cause to the supreme court of Nebraska, and subsequently the same came on for argument and final hearing in said supreme court, and thereupon, on consideration, the supreme court of Nebraska, reversed the decision of said district court of Dodge county, and ordered the deduction of all interest paid on said mortgage indebtedness by said George Thrush to said Schuyler national bank, and thereby applied the penalty provided by the usury laws of Nebraska against said Schuyler national bank, and against the rights of said Schuyler national bank to exemption from the penalties prescribed by the usury laws of Nebraska secured to the said Schuyler national bank by the laws of the United States. And afterwards, on the 10th day of
273 August, 1901, by its mandate, commanded the said district court of Dodge county, Nebraska, to enter the decree complained of.

And your petitioner thereupon filed in said supreme court a motion for a rehearing of said cause, alleging that by said decision of said supreme court, said Schuyler national bank had been denied a right secured to said bank by the laws of the United States relating to national banks. A rehearing was granted, and your petitioners urged the rights of said Schuyler national bank under the laws of the United States, alleging that it had been denied its rights, privileges and exemption thereunder.

But upon said rehearing the contention of your petitioner was by said supreme court overruled, and on the 4th day of January, 1902, the said district court of Dodge county, under said direction of the said supreme court, entered its final judgment.

Your petitioner thereupon appealed from said judgment to the supreme court of the State of Nebraska, which said supreme court on the 19th day of February, 1902, affirmed said last described decision, and by its decision and judgment reducing the amount originally entered by said district court for $3000.00 in favor of your petition- the said Schuyler national bank, to $884.00, but against said Schuyler national bank upon its just claim to the full amount found due by said district court in its original decree, in the sum of $3000.00, and legal interest at the rate of 7 % per annum
274 from the date of said original finding and decree on the 31st day of August, 1895, as will appear from the several opinions of the court attached to the record here presented with this application for the inspection of the court.

Wherefore, your petitioners pray for the allowance of a writ of error by the Supreme Court of the United States, and such other

process as will enable the petitioners to obtain a review of the case and a correction of the errors alleged.

THE SCHUYLER NATIONAL BANK OF SCHUYLER, NEBRASKA, AND WILLIAM H. SUMNER,
By C. J. PHELPS, *Their Attorney.*

Writ of error and citation in the within cause allowed.

J. J. SULLIVAN,
Chief Justice.

(Endorsed:) 12533. Gadsden *v.* Thrush. Petition for writ of error. Supreme court of Nebraska. Filed Apr. 4 1902. Lee Herdman, clerk.

275 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the *judges of the* supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Schuyler National Bank, of Schuyler, Nebraska, and William H. Sumner, appellants, and George Thrush, Charles Thrush, Sr., Mattie N. Thrush, Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased, The Nebraska State Bank of Schuyler, Nebraska, James Gadsden, J. C. Noyes, and The First National Bank of Schuyler, Nebraska, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constiution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right privilege or exemption specially set up or claimed under such
276 clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said The Schuyler National Bank, of Schuyler, Nebraska, and William H. Sumner, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you

have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of April, in the year of our Lord one thousand nine hundred and two.

GEO. H. THUMMEL,
[SEAL.] *Clerk U. S. Circuit Court, District of Nebraska,*
By JOHN NICHOLSON, *Deputy.*

Allowed by
J. J. SULLIVAN,
Chief Justice of the Supreme Court of the State of Nebraska.

277 (Endorsed:) # 12533. Gadsden *v.* Thrush. Writ of error. Supreme court of Nebraska. Filed Apr. 4 1902. Lee Herdman, clerk.

THE STATE OF NEBRASKA, *ss:*

In obedience to the commands of the within writ, I Lee Herdman, clerk of the supreme court of said State, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to-wit, petition for writ of error, writ of error, assignment of error, copy of bond, citation, and acknowledgment of service.

In testimony whereof, I have hereunto set my hand and
[SEAL.] caused to be affixed the seal of said court, at the city of Lincoln, this 16th day of April, A. D. 1902.

LEE HERDMAN,
Clerk of the Supreme Court,
By E. W. NELSON, *Deputy.*

278 Know all men by these presents that we, The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, as principals, and M. L. Weaver, and M. D. Cameron, as sureties, are held and firmly bound unto George Thrush, Mattie Thrush, James Gadsden, The Nebraska State Bank of Schuyler, Nebraska, and The First National Bank of Schuyler, Nebraska, in the full and just sum of $1000.00, to be paid to the said George Thrush, Mattie Thrush, James Gadsden, The Nebraska State Bank of Schuyler, Nebraska, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of April, 1902.

Whereas lately, at a session of the January term, 1902, of the supreme court of the State of Nebraska, in a suit depending in said court between James Gadsden, plaintiff, and George Thrush, Mattie Thrush, The Nebraska State Bank of Schuyler, Nebraska; William H. Sumner, The Schuyler National Bank of Schuyler Nebraska, a judgment was rendered against the said Schuyler National Bank and William H. Sumner and in favor of said George Thrush and Mattie Thrush, and the said William H. Sumner and The Schuyler National Bank of Schuyler, Nebraska appealing therefrom to the Supreme Court of the United States, and having obtained a record and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed
279 to the said George Thrush and Mattie Thrush, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SCHUYLER NATIONAL BANK AND
WILLIAM H. SUMNER,
By C. J. PHELPS, *Their Attorney.* [SEAL.]
M. L. WEAVER. [SEAL.]
M. D. CAMERON. [SEAL.]

Signed and sealed and delivered in presence of
I. E. ARNOLD.

Approved by
J. J. SULLIVAN,
Chief Justice of the Supreme Court of Nebraska.

(Endorsed:) 12533. Gadsden *v.* Thrush. Bond. Supreme court of Nebraska. Filed Apr. 4 1902 Lee Herdman, clerk.

280 And afterward, to-wit, on the 16th day of April, 1902, there was filed in the office of the clerk of said court a certain citation in words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss:*

To James Gadsden, George Thrush, Mattie Thrush, the Nebraska State Bank, of Schuyler, Nebraska, and the First National Bank of Schuyler, Nebraska, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Nebraska wherein The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner are plaintiffs in error and you are defendant in error, to

show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. J. Sullivan, chief justice of the supreme court of the State of Nebraska, this 6th day of April in the year of our Lord one thousand nine hundred and two.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of the State of Nebraska.

281 (Endorsed:) Due service hereof is acknowledged this 7th day of April, A. D. 1902. Geo. H. Thomas, att'y for def'ts in error. 12533. Gadsden v. Thrush. Citation and service. Supreme court of Nebraska. Filed Apr. 16 1902. Lee Herdman, clerk.

282 THE STATE OF NEBRASKA, *ss:*

In obedience to the commands of the within writ, I, Lee Herdman, clerk of the supreme court of said State, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to-wit, petition for writ of error, writ of error, assignment of error, copy of bond, citation, and acknowledgment of service.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 16th day of April, A. D. 1902.

LEE HERDMAN,
Clerk of the Supreme Court,
By E. W. NELSON, *Deputy.*

STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of James Gadsden against George Thrush, Charles Thrush, Sr., Mattie N. Thrush, Englebert Folda and Margaret Folda, administrators of the estate of Frank Folda, deceased; William H. Sumner, and The Nebraska State Bank of Kearney, Nebraska, as fully as the same remains on file and of record in my office, and as more specifically — out in my certificate herein dated March 27th, 1902, and found
283 on page — of this record.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court at the city of Lincoln, the 16th of April, 1902.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk of the Supreme Court of Nebraska,
By E. W. NELSON, *Deputy.*

284 In the Supreme Court of the United States, October Term, 1902.

THE SCHUYLER NATIONAL BANK OF SCHUYler, Nebraska, *et al.*, Plaintiffs in Error,
vs.
JAMES GADSDEN ET AL., Defendants in Error.
} No. 319. Stipulation.

It is stipulated and agreed by and between the parties to the above entitled suit, that in printing the record therein, the following specified portions thereof may be omitted, or printed, as hereinafter designated, namely: Using old record No. 365, October term, 1899, and where the number of the page is used it is that of said old record) Beginning on page 1, printing title of the cause and down to and including line 23 on said page 1. Omitting all the remainder of said page 1, and succeeding pages to page 15 and the first 16 lines on said page 15. Printing from the last designated point on said page 15 all the remainder of said page and succeeding pages to page 53. and the first 12 lines on said page 53. Omitting all the remaining portion of said page 53 and succeeding page to page 55 and the first 8 lines on said page 55. From the last designated point print the remaining portion of said page 55 and succeeding pages to page 101 and the first 5 lines on said page 101. From the last designated point on said page 101, omit all the remaining portion of said page 101 and succeeding pages to page 146. From the last designated point on said page 146, print all the remaining portion of said page 146 and succeeding pages to page 160, and the first 7 lines on said page 160. From the last designated point on said page 160, omit all the remaining portion of said page 160 and the succeeding pages to page 212, and the first 16 lines on said page 212. From
285 the last designated point on said page 212 print all the remaining portion of said page 212 and succeeding pages to the end of said old record.

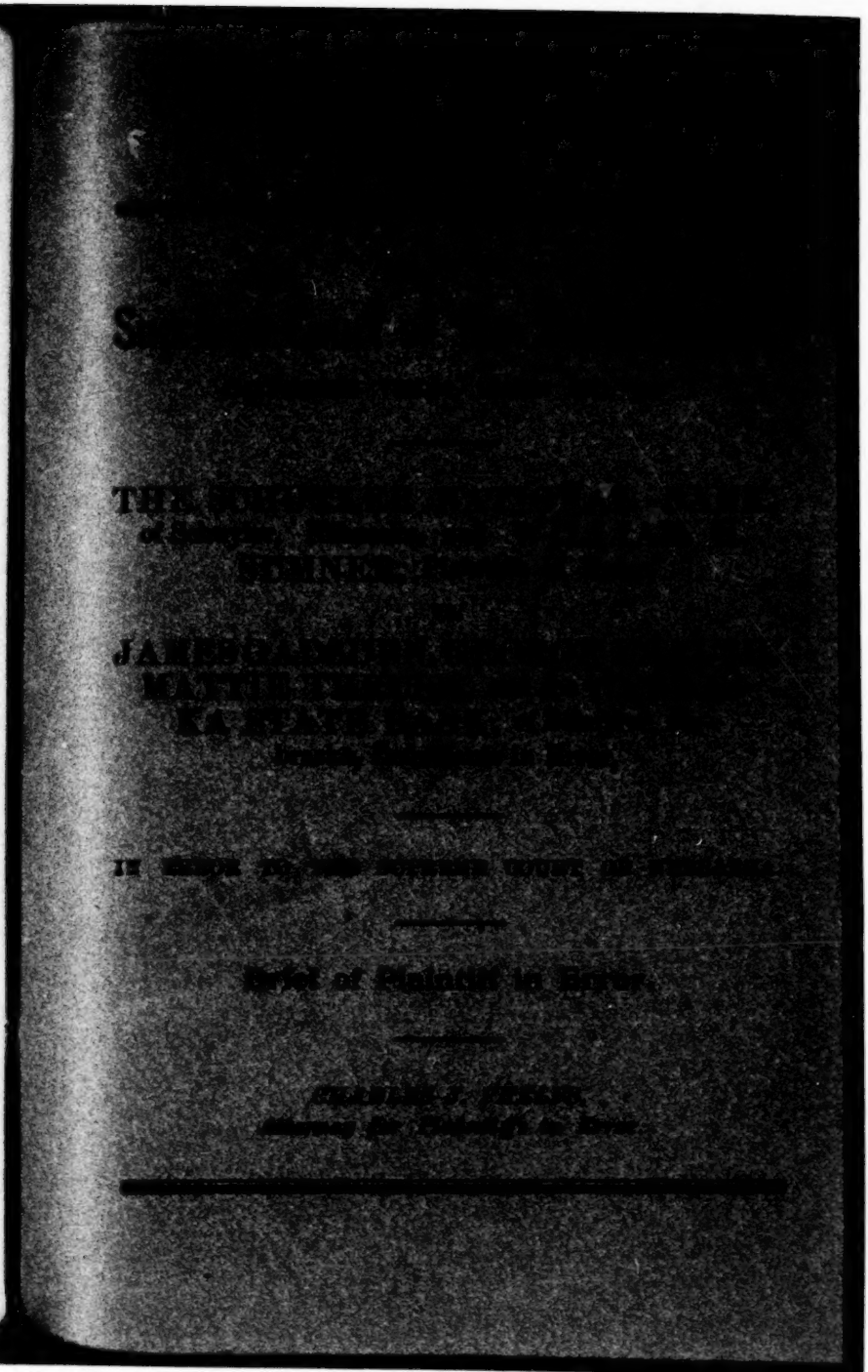
In addition to the above the entire record of subsequent proceedings is, of course, to be printed in full.

C. J. PHELPS,
Attorney for Plaintiffs in Error.
WILLIAM HENRY DENNIS,
Attorney for Defendants in Error.

[Endorsed:] United States Supreme Court No. 319, October term, 1902. The Schuyler National Bank of Schuyler, Nebr. pl'ff in error, *vs.* James Gadsden *et al.*, defendants in error. Stipulation.

286 [Endorsed:] File No. 18,520. Supreme Court U. S. October term, 1902 Term No. 319. The Schuyler National Bank of Schuyler Neb. P. E. *vs.* Jas. Gadsden *et al.* Stipulation as to printing record. Filed April 21, 1903.

Endorsed on cover: File No. 18,520. Nebraska supreme court. Term No. 319. The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, plaintiffs in error, *vs.* James Gadsden, George Thrush, Mattie Thrush, *et al.* Filed April 30th, 1902.



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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903. NO. 219. 570.

THE SCHUYLER NATIONAL BANK, of Schuyler, Nebraska, and WILLIAM H. SUMNER, Plaintiffs in Error,

vs.

JAMES GADSDEN, GEORGE THRUSH, MATTIE THRUSH, and the NEBRASKA STATE BANK, of Schuyler, Nebraska, Defendants in Error.

IN ERROR TO THE STPREME COURT OF NEBRASKA.

Brief of Plaintiff in Error.

The facts disclosed by the record involved in this suit, as between the plaintiffs in error and the defendant Thrush, are: that on the 8th day of August, 1890, Thrush had been a customer of the bank from a time anterior to the 24th day of July, 1889; had borrowed various sums of money at the

bank at different times; renewing his note therefor from time to time, and on the 8th day of August, 1890, was indebted to the bank in the sum of $1436.55, and on that day, to secure the same and the further sum of $3334.45, in all the sum of $4771.00, he, together with his wife, the defendant Mattie Thrush, executed and delivered to the bank his note for $5,000, and to further secure the same made and delivered their promissory note to William H. Sumner, who was and is the president of the bank, and a mortgage on the real estate involved in this action, which said last note and mortgage are referred to in the pleadings and evidence as collateral to secure the debt due the bank. These were held as securities for all the moneys loaned by the bank to Thrush. On some of these loans a rate exceeding the legal rate, ten per cent per annum, was charged by the bank and at the time the $5,000 note and mortgage were executed, interest to the amount of $229, in advance for six months, was computed at a rate exceeding the legal rate and this sum, $229, has been carried in the notes computed in making up the sum of $3229, claimed in plaintiff's cross bill and for which the trial court entered a decree, less the sum of $229. But all interest charged at a usurious rate and paid by Thrush, was charged, paid and received more than two years before the bringing of this action. These items of usurious interest paid to the bank, were, by the trial judge, disregarded, because of that fact appearing in the bank and Sumner's plea, as also in the evidence.

The suit was originally brought by Gadsden, and Sumner was made a defendant. He in his answer and cross bill, [record page 11]sets up the transaction showing the Schuyler National bank to be the real party in interest, and on its application, Sumner uniting, the Schuyler National Bank was made a party in conjunction with Sumner, [see record pages 42, 43 and 44], and bring the case into this court by appeal.

Defendant Thrush and his wife each filed answer to Sumner's cross bill, identical in matter [record pages 14 and 25] setting up the borrowing of the money by Thrush from the bank , and alleging the payments of interest and the rates charged.

To these answers each specifying and setting out in twenty-one numbered paragraphs the times when and the amounts which it is alleged George Thrush paid excessive charges, reply is made by the bank and Sumner, denying some of the allegations, and setting up the bar of the statute of limitations, as to each item, and alleging that the court has no jurisdiction in this action. The plaintiffs claim that in a suit brought expressly by one having paid usurious interest to a national bank, only, can the statutory penalty be recovered, and that such payments made, as in this case is claimed, cannot be the basis of counter claim or set-off. [See record pages 36 and 39].

The court in its findings and decree [see 2nd ¶ of de-

cree, record page 49 and 50] found that there was included in the claim of the bank for $3229.00, $229 usurious interest contracted for and included in the $5,000 note and executed on the 8th day of August, 1890, and this was deducted from the amount claimed, but upon every other fact pleaded and claims made by the bank, the court's finding was for the bank.

That the mortgage and note made to Wm. H. Sumner was to secure a debt due the bank for moneys wholly furnished by the bank and entitling the bank to a lien upon the premises described in the mortgage, fully appears from the undisputed evidence of the cashier, J. S. Johnson, and the admission of the defendant, George Thrush.

That the the items of interest set out in the answer filed to the cross petition of the defendants Wm. H. Sumner and the Schuyler National bank and charged as paid by said George Thrush, were, as alleged in the replies thereto, transactions occurring more than two years before the commencement of this suit, clearly appears.

That as to the allegations of the excessive interest made in paragraphs 21, 22, 23 and 24, of defendants George and Mattie Thrush's answer, and denied in the replies of William H. Sumner and the Schuyler National Bank, the proof fully sustains the finding and decree.

The ffnding that the interest contracted for on August

8th, 1890, to the amount of $229, carried as unpaid interest contracted for in the note of $3229, is a finding taken with the entire finding and decree, in effect for the bank upon every other issue between the bank and Thrush. That the transactions involved are to be dealt with under the laws of congress and not by the law of the state, need not be argued, it is clearly apparent notwithstanding the ingenious contention of opposing counsel, to sustain which the testimony of Thrush and Johnson would all have to be disregarded.

The decision of the Supreme Court of Nebraska imposes the penalty prescribed by the Nebraska statute, [record page 117]. In the opinion Irvine C. [record page 118], the court makes the following brief summary of the facts:

> "Thrush was largely indebted to that bank. He obtained a further loan and executed to the bank a note for five thousand dollars to represent the consolidated indebtedness. At the same time there was made a note for a like amount to William H. Sumner and a mortgage to Sumner to secure the latter note. Sumner was an officer of the bank. He had no individual dealings with Thrush, and the sole purpose of the note and mortgage to him was to secure the debt due the bank. Certain payments were paid on the bank's note, so that when it came to foreclosure the bank claimed as due only $3229.

To the cross petition of Sumner, in which the bank was permitted to join, Thrush pleaded usury. It was clearly shown that the transactions between Thrush and the bank were tainted with usury, and the court so found. But the view was taken that, as the transaction was in effect with a national bank, the remedies afforded by the act of Congress were exclusive, and that Thrush was not entitled to the benefit of the state laws whereby he might set off against the principal all payments made of interest. Accordingly there was allowed this bank its principal."

In the motion for a rehearing [record page 122] and finally [record page 113], the federal question is more especially and specifically set up, and the claim that a right secured by a law of Congress denied is most urgently presented to the Supreme Court of Nebraska.

There was no decision in the trial court against the plaintiffs in error, It is the decision of the Supreme Court of Nebraska that plaintiffs complain of, and as in duty bound plaintiffs in their motion for rehearing allege:

"Now comes William H. Sumner, for and on behalf of the Schuyler National Bank, of Schuyler, Nebraska, and the said Schuyler National Bank, of Schuyler, Nebraska, defendants herein, and move the

court for a rehearing of said cause and, for grounds of their motion, say:

First: That said Schuyler National Bank is an Association incorporated under the laws of the Congress of the United States, relating to national banks.

Second: That by the decision of this court the said Schuyler National Bank has been denied a right secured to it by the laws of the United States, relating to national banks, in this, to-wit. That in said decision the provisions of the law of the state of Nebraska, relating to interest and providing a penalty for usury, have been declared against said Schuyler National Bank and embodied in said decision. That said decision is erroneous because the penalties provided in sections 5197 and 5198 of the Revised Statutes of the United States are exclusive, and they only can be enforced against said Schuyler National Bank, because it is fully shown in the pleading, proof and record that the transaction in the suit between said Schuyler National Bank and the defendant, George Thrush, arises solely from moneys loaned on its own account by said Schuyler National Bank to said George Thrush, and interest paid thereon by said George Thrush to said Schuyler National Bank, between whom the decision complained of was made.

Third: The defendant, George Thrush, in his answer to the Schuyler National Bank's cross petition, fully acknowledges the transaction involved to be a *loaning of money* by said bank to him, and sets out the items of interest by him paid, always to the said Schuyler National Bank, acknowledging that the note and mortgage to William H. Sumner were collateral to the debt due the said bank, but in his prayers for relief, asks to have the amounts of interest so paid deducted from the principal sum loaned, which this court by its decision complained of, orders done, which denies said Schuyler National Bank its rights secured by the laws of Congress relating to national banks, imposing upon said National Bank the penalties of the usury laws of the state of Nebraska, which do not apply to national banks and ought not to be imposed in this suit between the said Schuyler National Bank and the said George Thrush.

This cause comes, finally, on error from a decision of the Supreme Court of Nebraska, reaffirming its decision directing the trial court to compute the amount due the plainliff in error in accord with the opinion of the state Supreme court.

The late decision affirming the trial court's decision, finding the amount due plaintiff in accord with the former opinion, and is final in every respect as affecting the question

of the jurisdiction of this court.

Plaintiff's brief was prepared when it brought the case here upon the sormer decision of the state court and is practically unchanged; the issues have not been in any wise changed. The plaintiff's motion for rehearing in the former trial and in the final hearing being identical and the final decision being in accord with the former opinion and after the findings made in compliance therewith by the trial court.

The case was here upon the petition in error of plaintiff, argued, submitted and dismissed, for want of jurisdiction, because the former decision of the state court was not a final decision, at the October Term, 1900, of the Supreme Court of the United States. [179 U. S. 384].

The decree entered in the trial court on the 31st day of August, 1895, 2nd paragraph, [record page 49] is, plaintiffs contend, in accord with the law governing the rights of the parties.

This decision was reversed by the Supreme Court of Nebraska in a decision rendered on the 3rd day of November, 1898, [record page 117] coupled with the opinion of the court found at page 120 of the record.

This reversal remanded the case to the trial court, the mandate directing the trial court to compute the amount, [See record page 1]

Final decree in the trial court was entered on the 4th day of January, 1902. [See record page 3, paragraph 2 on page 4.]

The case was then appealed to the Supreme Court of Nebraska, and on the 19th day of February, 1902, decided [record page 112] with the opinion of that court. [See record page 111.]

Plaintiff's motion for rehearing, identical with its former motion, discussed in the following brief is found at record page 113.

Plaintiff's assignment of error, identical with the former assignment of error, is found at record page 140.

The sole contention to sustain the judgment of the Supreme Court of Nebraska, in reversing the finding and judgment of the trial judge, is that the transaction should be regarded as one between Sumner and Thrush, in disregard of the rights of the bank as a national bank, protected by the laws of Congress governing national banks and prescribing all the penalties that may be imposed upon a national bank, and imposing the penalty prescribed by the statutes of Nebraska, which the Supreme Court of Nebraska did. See decision (record page 117, affirmed in final judgment, record page 112) and the opinion touching this plaintiff's rights (record pages 111 and 112.)

The Nebraska Statute provides: (Chapter 44, title interest.)

Section 1. (Rate.)— Any rate of iterest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest may be taken yearly or for any shorter period, or in advance if so expressly agreed.

Section 5. (Usury—Consequences—Agents)—If a greater rate of interest than is hereinbefore allowed shall be contracted for or received, or reserved, the contract shall not, therefore, be void; but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover the costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid; provided, the acts and dealings of an agent shall bind the principal, and in all cases where there is illegal interest by the transaction of the agent, the principal will be held thereby as if he had done the same in person. Where the same person acts as agent for the borrowers who obtains the money from the lender, he shall be deemed to be the agent of the loaner also.

SPECIFICATION OF ERRORS RELIED UPON.

First: That by the decision of the Supreme court of Nebraska the said Schuyler National Bank, an association incorporated under the laws of the Congress relating to national banks, has been denied a right secured to it by the laws of the United States relating to national banks, in this, to-wit: That in said decision the provisions of the law of the state of Nebraska relating to interest and providing a penalty for usury have been declared against said Schuyler National bank and embodied in said decision.

Commissioner Irvine's statement in the opinion of the court above set forth, the pleadings in the trial court, and the decision itself unmistakably support the allegations of this error.

Second: That said decision is erroneous because the penalties provided in sections 5197 and 5198 of the revised Statutes of the United States are exclusive, and they only can be enforced against said Schuyler National bank, because it is fully shown in the pleadings, proof and record that the transaction in suit between said Schuyler National Bank and the defendant, George Thrush, arose solely from moneys loaned on its own account by said Schuyler National Bank to said George Thrush and interest paid thereon by said George Thrush to said Schuyler National Bank, between whom the decision complained of was made.

That the transactions involved were those where the Schuyler National Bank loaned its money directly to Defendant Thrush and received interest and payments thereon directly from him, is fully agreed to by the parties, witnesses and the finding of the trial court, concurred in by the opinion of the State Supreme Court.

Third: The defendant George Thrush, in his answer to the Schuyler National Bank's cross petition, (record pages 14 to 24 inclusive) fully acknowledges the transaction involved to be a loaning of money by said Schuyler National Bank to him, and sets out the items of interest by him paid, always to said Schuyler National Bank, acknowledging that the note and mortgage to said William H. Sumner were collateral to the debt due the said Schuyler National Bank; but in his prayer for relief asked to have the amounts of interest so paid deducted from the principal sum loaned, under the provisions of the law of Nebraska, which said supreme court of Nebraska, over-ruling the trial court, by its decision complained of ordered done, which decision denies said Schuyler National Bank its rights secured by the laws of Congress relating to National banks, imposing upon said Schuyler National Bank the penalties of the usury laws of Nebraska, which do not apply to national banks, and are erroneously imposed in this suit between said Schuyler National Bank and said George Thrush.

Fourth: The decision complained of is based upon the error of the court in assuming that the note and mortgage to Wil-

liam H. Sumner were made with intent to evade the inhibition against the taking by a national bank of real estate security for loans made at the time, whereas there is not the slightest evidenceto support such an inference, and the exact opposite fully appears in the record, and that it was not wholly for money loaned at the time, but prior thereto to a large amount.

Thrush's attorney called Johnson, the bank's cashier, to the witness stand, who, in answer to his direct questions, clearly shows that there was no such intent on the part of the bank. See record page 87 beginning with question No. 442.

Fifth: The court erred in assuming that the naming of William H. Sumner as mortgagee was done with intent to deceive or defraud said George Thrush, and there is no evidence to sustain such a finding.

Johnson testified (record page 59) that making the mortgage to Sumner was satisfactory to Thrush, and he is in no wise disputed in this. It was talked over and agreed to, as shown by the testimony of both the cashier and Thrush, before the notes and mortgage were given.

Sixth: The court erred in holding the Scl ler National Bank estopped, because there was no estoppel pleaded and there was no evidence whatever to support any ground or finding of estoppel.

We submit the following considerations:

That the Schuyler National Bank, one of the plaintiffs in error, is an association incorporated under the laws of the Congress of the United States relating to national banks, and doing business as such in all the transactions involved in this suit between it and the defendant, George Thrush, fully appears in the pleadings, proof and record herein. [See averment in cross petition and Johnson's evidence, record page 55, in answer to questions 1, 2, 3 and 4.]

That the principal contention, as between the defendant George Thrush and the Schuyler National Bank, is, and has been, as to whether the usury laws of the state of Nebraska should govern in determining the rights of the parties, the bank at all times contending that the laws of Congress relating to national banks, alone govern and determine its rights in this case. The court below sustained the bank's contention, but the Nebraska Supreme Court [record page 49, paragraph 2] reversed that decision and entered a decision imposing the penalties prescribed by the laws of the state of Nebraska.

The bank complains that the decision is against its rights, privileges and immunities secured by the laws of the United States relating to national banks.

That the penalties imposed by sections 5197 and 5198 of the Revised Statutes of the United States are the only penalties which can be imposed in this suit, seems established by

every decision since that made in the Supreme Court of the United States in 1875, in the case of the Farmers' and Merchants' Bank of Buffalo vs. Deering, 91 U. S. 196, in which it was held that "It must always be borne in mind that the Constitution of the United States and the laws which shall be made in pursuance therewith are the supreme law of the land, and this law here involved is as much a part of the law of each state, and as binding upon its authorities and people as its own local constitution and laws." And it was expressly held in that case that the law of the state did not apply, and upon that point the decision of the Court of Appeals of New York was reversed. That decision has been uniformly followed until the one we are engaged in was reached. The learned judge rendering the decision fell into the error of assuming that the collateral note and mortgage made to William H. Sumner—we call the paper collateral, Thrush in his answer calls it collateral—was made with intent "to evade the inhibition against the taking by a national bank of real estate security for loans made at the time." The proof is clear and full that no such intent or reason moved the bank. Johnson, the cashier of the bank, who personally attended to every item of the transaction between the bank and Thrush, in answer to the direct question by Thrush's attorney, "Wasn't this the reason that the bank did not have authority to take real estate security on loans?" answered, "No sir, we have authority to take real estate security on loans." [Record page 87,

answer to question 443.] And following along to and including question 447 he explains satisfactorily the reasons for taking collateral security in the name of William H. Sumner, and in none of his statements is the inference left which seems to have formed the basis of the decision complained of.

What if he did? Could that authorize a court to impose the penalties provided by the state laws, which have no force in the determination of the rights and liabilities of a national bank?

But Johnson was right in his answer. A national bank has the right to take real estate security for a debt past due. A large sum, a portion of the $5000, was past due; for that, at least, the bank had the right to receive a mortgage. That the money secured also, money that day loaned, even though prohibited, does not make the security less effective, nor take away the right of the bank to a decree of foreclosure.

In the State National Bank vs. Flathers, 45 La Ann 75, it was held that the objection that a national bank has loaned money on real estate in violation of the prohibition of the national banking laws does not lie in the mouth of the delinquent debtor of such loan and does not disable the bank from enforcing the mortgage. The United States alone can complain of such violation.

In Winton vs. Little, 94 Pa. St. 64, it was held that real estate security taken by a national bank for present or future

advances is valid.

In National Bank vs Whitney, 103 U. S. 99, it was held that where real estate security had been taken to secure a present or future loan, no one but the government can be heard to complain that the bank has exceeded its power.

The case of the Union National Bank of St. Louis vs Elizabeth Matthews, 98 U. S. 188, was the first case that reached the Supreme Court of the United States, presenting the question of the effect of a national bank taking real estate security on a loan when made, holding the mortgage security valid and enforceable, citing with approval Bank vs Haire, 36 Iowa, 443, where an arrangement for the benefit of the bank was through a third person quite as indirect as in this case.

Among the cases bearing upon the question involved are Swope vs Leffingwell, 105 U. S. 3; Reynolds vs National Bank, 112 U. S. 405; Fortier vs National Bank, 112 U. S. 439; Wheney vs Hale, 77 Mo. 20.

The collateral note and mortgage were made to secure the debt due from Thrush to the bank. It was not done with intent to in any way deceive or defraud Thrush, nor in any way did, or could it, affect his liability to the bank or the right of the bank to foreclose the mortgage. The debt is the basis of the oank's claim and rights, the mortgage is a mere incident of the debt and follows it, so, in substance, held

in Webb vs. Hoselton, 4 Neb. 318, and in perhaps a thousand other cases. The debt is, and at all times has been the property of the bank, so also the security.

The bank, as shown by the decision above cited, has a clear right to foreclose its mortgage. Having a right to foreclose, it must be treated, so far as this suit is concerned, as having a valid and in every respect a lawful note and mortgage. How, then, can the court apply a penalty provided by the laws of Nebraska, which cannot, at law or in equity, be imposed upon a national bank?

The decision complained of is supported in the opinion by the declaration that the bank took the name of William H. Sumner "to evade the inhibition against the taking by a national bank of real estate security for loans when made at the time." We have shown that the record does not support that view. But it is further said of the bank that "the object was to evade the burdens attaching to its position as a national bank," which we contend is not to be inferred from any evidence in the record. Upon this basis the decision declares "It would be highly unconscionable to permit a person to give a contract a false form to evade the burdens which would follow from i s true expression, and then permit him to show the truth as against the form to evade the burdens cast by a contract in the form which has been so chosen."

As between these parties no burden would fall upon the

bank had it been named in the mortgage as a mortgagee. In National Bank vs Whitney, 103 U. S. 99, the court, in speaking of the decision in National Bank vs Mathews, 99 U. S. 621, says:

"The construction of the act of Congress thus given has been acted upon by the National banks throughout the country since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of the interests of the country than would follow a new ruling of the court, for statutory regulations would operate only in the future.

"The decision in the case cited controls the present case, and in conformity with it, we must hold that the mortgage to the bank, so far as the subsequent incumbrances are concerned, is to be regarded

as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government.—Fleckner vs Bk. 8 Wheat 338 to 355.

With this in view it can hardly be urged that the bank was seeking to evade burdens. For twenty years national banks have been sustained in taking real estate security for such loans, and Mr. Johnson was right when he said it was not taken with any such intent as is imputed to the bank. But is the bank estopped from showing, as in fact it has shown, the true state of facts upon which it relies? Thrush was not deceived, nor was he in any way defrauded, nor was he induced to do any act or thing different because of the making of the collateral paper. There is no essential element of estoppel in the conduct of the transaction on the part of the bank. There was no false representation or concealment of material facts. Thrush was not ignorant of any fact inducing his execution of the contract or entering into the contract itself, nor was he induced to execute the contract by any mis-statement, deceit or fraud whatever. The record discloses just what the collateral note and mortgage were taken for, and the reasons. Thrush shows in his evidence that, while he knew every fact and circumstance, he does not recollect just what was said. In answer to his counsel's in-

quiry: "Was there anything said about what the note and mortgage to William H. Sumner was to be for?" he says (record page 68, questions 164 and 165) "To make it better security." And to his counsel's further query: "What was said about what Sumner was to do the mortgage?" he replied: "There was nothing said." On page 84 of the record, question 397, his counsel again asked him: "Was there anything said as to why this $5,000 note and mortgage was to be made to Mr. Sumner?" He said, "No, sir." "Did Mr. Johnson say anything on that branch?" He answered, "Said 'make it to him,'" meaning Sumner, "He said 'make it to William H. Sumner, not to the bank."

But counsel for Thrush, evidently not satisfied with his client's testimony, called Mr. Johnson to the stand, making him a witness for Thrush, who testified in answer to Mr. Dolezal's questions in reference to taking the collateral: (record page 87, questions 442 and 443, above referred to) "It was simply a habit that the Schuyler National Bank had of taking collateral in Mr. Sumner's name." And in answer to the question: "Wasn't this the reason, that the bank did not have authority to take real estate security on loans?" he said, as before stated, "No sir, we have authority to take real estate loans as security," and being further questioned by Dolezal, he said: "It was simply our habit, I can't see any good reason for it myself." And on record page 61, question 74 in answer to Dolezal's inquiry, Johnson testifies that the col-

lateral was taken "Because that was mutually agreed then to be left as security." It was left as collateral, and speaking of the collateral (record page 91, question 500) he said, "It is easier to handle, easier to release. He could release it quicker than the bank could; we would have to have a meeting, really, to release such things."

And on record page 92, question 516, answering Dolezal's question "Why was this note for $5,000 taken at all, exhibit No. 1?" he said: "It was done to secure the bank as collateral." Dolezal, still questioning him, asked [record page 93, question 528) "Did you have any authority to endorse this exhibit 1 in Mr. Sumner's name?" he answered: "Why, it didn't need any endorsement, it was left as collateral."

From the evidence it is submitted that no just inference can be drawn that the bank took the collateral note and mortgage to evade the provisions of the national banking laws. Certainly there is nowhere in the evidence any testimony whatever showing the elements constituting the basis of an estoppel against the bank.

It should be remembered that the defendant, Thrush, in his answer to the cross-petition of the Schuyler National bank, declares, and repeats again and again that declaration, that the note and mortgage to William H. Sumner, were collateral to, and made to secure the debt due to the bank. Before the note to the bank and the collateral note and mortgage in the

name of William H. Sumner, were made, executed and delivered, and before the additional sum of money was paid to Thrush, it was clearly agreed and understood between Johnson, the cashier, and Thrush, that the mortgage should be made in the name of William H. Sumner, the bank's president. And nowhere in said answer, or in any pleadings in the case, does he attempt to plead an estoppel against said Schuyler National Bank.

If an estoppel be relied upon as a defense to an action, it must be plead, or it will not avail the party.—B. & M. R. R. Co. vs Harris, 8 Nebraska 140.

If to either party is to be applied the doctrine of estoppel, surely it is not to the bank, but to Thrush, the obligor. The mortgage and note to Sumner is, by agreement of all parties, collateral to the debt due to the bank, which is evidenced by the note executed to the bank. Thrush is therefore estopped by the recital in the note to the bank from denying his indebtedness to the bank, and that the transaction is between the bank and himself.

If the contract were an illegal one, then possibly Thrush could plead an estoppel, and the bank be estopped from showing that the debt is due to it and not to Sumner; but the contract is not an illegal one, either under the laws of Nebraska or of Congress.

Certainly if the question of usury is open to investigation

in this suit, it is made so as between the bank and Thrush and carries with it every question of fact involved in the transaction. To say that the bank shall suffer a penalty under the law, and not be entitled to whatever benefits the law secures to it, is a proposition that will hardly stand scrutiny.

Certainly estoppel by conduct is not involved in the dealings between the bank and Thrush, for not one of the elements of estoppel enter into their dealings.

What constitutes the elements of such estoppel is stated in Bigelow on Estoppel, Fifth Edition, page 570:

1. "There must have been a false representation or a concealment of material facts.

2. "The representation must have been made with knowledge, actual or virtual, of the facts.

3. "The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter.

4. "It must have been made with intention, actual or virtual, that the other party should act upon it.

(The conduct of the party to be estopped must be at least misleading.—Bigelow on Estoppel, page 669 and on page 670. Again on page 671: "The act or conduct of the party to be estopped must be such as would be apt to mislead a prudent man in a case where there is much risk.")

5. "The other party must have been induced to act upon it."

Under the rule announced by the Nebraska court in Nash vs Bakes, 58 N. W. 706, that "In order to constitute an equitable estoppel by silence or acquiescence it must be made to appear that the facts upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged, and unknown to the party urging it."

In the opinion we are complaining of, reference is made to the "terse headnote" to Hayes vs People, 25 N. Y. 390, illustrating, it is said, the principle which the learned commissioner regards as involved in this case. In that case concealment, deceit and fraud were practiced upon one of the parties to a contract of marriage, and the party guilty of the deceit and falsehood was, of course, estopped to deny that the contract was sufficient in law to sustain a conviction for bigamy. But suppose both, with full knowledge of all the facts, had conspired to go through the form of a marriage ceremony to deceive the neighbors, would it then have been bigamy, or simply a case of fornication and adultery? How that case can in any view, afford support to the conclusion that a party to a contract who conceals nothing, deceives nobody, and where every fact and circumstance is as well known to the party for whom the estoppel is urged as to the party is who to be estopped, is beyond our understanding of the law, and it is equally hard to understand what principle of law can be

invoked to estop the bank from relying upon the truth, which at all times has been as fully known by Thrush as by the bank's officer with whom he was dealing.

The transactions having all been between the bank and Thrush; and all founded upon loans by and for the bank to Thrush, and the mortgage made by agreement between the bank and Thrush to secure the debt to the bank, inures, as it was intended, to the benefit of the bank, and it could be enforced only by and for the benefit of the bank, governed by the law affecting the parties to the loan, Thrush and the Schuyler National Bank.

A recent decision of this court in the case of Seward A. Haseltine, et al vs the Central National Bank, 183 U. S. 118, holds: "Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a consolidation, cannot be set off in an action against the note, as the remedy provided by U. S. Rev. Stat. § 5198, when such usurious interest has been actually paid,—viz., a recovery in an action of twice the amount of interest thus paid, is exclusive."

For the reasons given, it is respectfully submitted that the judgment of the Supreme Court of Nebraska should be reversed and the judgment in the trial court be re-instated, with interest and the usual costs in the case.

C. J. PHELPS,

Attorney for Plaintiffs in Error.

No. 18,520.

Supreme Court of the United States.

THE SCHUYLER NATIONAL BANK, OF SCHUYLER, NEBRASKA, AND WILLIAM H. SUMNER,
Plaintiffs in Error.

vs.

JAMES GADSDEN, GEORGE THRUSH, MATTIE N. THRUSH, AND THE NEBRASKA STATE BANK, OF SCHUYLER, NEBRASKA,
Defendants in Error.

ERROR TO SUPREME COURT OF THE STATE OF NEBRASKA.

Argument and Brief of Defendants in Error, Thrush.

There are no precedents directly in point. The principles involved are clear, and defendants by way of argument and brief desire to state the conditions and make the propositions upon which the case was decided, and upon which they ask this court to refrain from interfering with the decision of the Supreme Court of Nebraska.

STATEMENT OF FACTS.

A brief statement of the facts is necessary to clearly set forth the propositions involved.

George Thrush borrowed of the Schuyler National Bank the sum of $5,000.00, for which, with *Charles Thrush, Sr.*, as surety, he gave his note to that bank. Payments were made until, according to the bank when this suit was begun,

there was due $3,229.00, not deducting usury. *This is not the note sued upon, nor the note upon which judgment is asked.*

On the same day George Thrush and *Mattie N. Thrush* executed and delivered a note for $5,000.00 and mortgage on real estate securing the same, to Wm. H. Sumner, *both note and mortgage upon their face being straight to Sumner as an individual and without expressing any trust, and without designating Sumner to be any officer or trustee or agent.*

Sumner gave no consideration whatever for the note or mortgage, but it was understood orally that whatever he got on this note and mortgage he was to turn over to the Bank.

This transaction took place in the State of Nebraska, and while both parties, George Thrush and Mattie N. Thrush and William H. Sumner were residents of that State. This is the note and mortgage brought into this suit by the cross petition of Sumner, and upon which decree herein is founded.

The defendants, George Thrush and Mattie N. Thrush, severally by their separate answers, set up usury, which in this foreclosure suit they ask to have applied on the note and mortgage under the Nebraska Statute and rulings thereon of the Nebraska Court.

William H. Sumner, and after trial by intervention, the Bank itself, joined in this request, seeking the benefit of the Federal Statutes relative to National Banks.

The Supreme Court of Nebraska, in the decision sought to be reviewed herein, held that as to this note and mortgage from George Thrush and Mattie N. Thrush to William H. Sumner—they being instruments and contracts between individuals residents of Nebraska—the Statutes of Nebraska as interpreted by its Court, applied and governed; that is, that the Federal Statute as to usury respecting National Banks did not apply; this is so far as the foreclosure proceedings themselves go.

PROPOSITIONS.

1st. The defendants Thrush submit that there is no Federal question raised in this case.

This they base upon the fact that the note and mortgage to Sumner being written contracts clear on their face between citizens of Nebraska as individuals, and made in Nebraska, the legal significance and status of those instruments are purely matters within the exclusive sovereign powers of the State, and when sued upon in the courts of that State, the remedies as given by the laws of that State are the only ones available.

2d. That this note and mortgage to Sumner involved in this suit because they are Nebraska contracts between individuals without in themselves expressing any trust or fiduciary relation, *they are, and can only be contracts between the parties in them designated.* Any one else claiming any right or benefit in them, can establish such right or benefit, not upon the ground that *he is a party to the contracts*, but upon the ground *that he is entitled to* succeed or take the rights of some party to it. This can be done by assignment or by operation of law or fastening a trust upon the interest of such party to the contract. It can never be done by claiming as a party but only by claiming the rights of one who is a party.

Therefore we submit to the Court that this note and mortgage to Sumner is a note and mortgage to Sumner; and it not expressing any trust relation nor any official capacity, the Schuyler National Bank cannot sustain its rights upon the ground that it is a party to it instead of Sumner; it can only claim the substantial benefits that Sumner could enforce. Thus suppose that before any default and before maturity in this case, Sumner had denied that he was to account to the Bank for whatever he received on that note and mortgage, what would have been the remedy of the Bank? Surely not an action against George and Mattie N. Thrush; but an ac-

tion against Sumner to compel him to assign the note and mortgage to the Bank, or a decree ordering him whenever he received any moneys thereon to pay the same over to the Bank. In either event the remedy to the Bank would be given not because it was a party to this note and mortgage, but for the reverse, *because it was not a party to the instruments.* For if the Bank were a party to the instruments its rights would be measured by those instruments, and being in writing, no parol evidence could contradict the writings, and it would need no remedy against Sumner in order to show its rights.

Therefore the defendants submit that the Schuyler National Bank claims rights and benefits to the Sumner note and mortgage in suit, in this action because it is not a party to them, but through, by, or in the right of Sumner, who is a party.

3d. The Federal Statute respecting usury on the part of National Banks, by its terms applies only to those instruments made directly to the Bank; that is to promissory notes or contracts to which the Bank is a party. Or to state it another way, where the Bank has a legal interest as one of the parties named in the contract, as a party. If it claims to succeed to the legal interest of a party, it is then not a contract within the Federal Statute; and the Bank is claiming simply as assignee or asserting some equity to entitle it to the benefits of some party named in the contract. Upon this point defendants respectfully refer to the original opinion of the Supreme Court of Nebraska and the opinion on the rehearing in this action and appearing in the record herein and the reasoning and authority therein cited.

It appears from the evidence in this action that the Sumner note and mortgage were by the parties treated long after they were given as the property of Sumner, for when Thrush sold

a part of the mortgaged land to Marxen, two notes—one of $1,600.00 and the other of $400.00—were made to Sumner by Marxen to secure a release of that part of the land from this mortgage. This, the evidence shows, was done by the concurrence of defendants, Thrush, and written by Johnson, cashier of this Bank, and in the Bank itself.

Further, the note from George Thrush and Mattie N. Thrush to Sumner in positive expressed terms is "* * to pay to W. H. Sumner or order * *." The mortgage is "* * to have and to hold the premises above described with all the appurtenances thereunto belonging unto the said Wm. H. Sumner and *to his heirs and assigns* forever * *."

To claim the benefit of these specific contracts defendants submit that as to the note the Bank must come in under "or order," and as to the mortgage under "assigns"—whether this be worked by a legal endorsement or assignment or through equitable rights as equitable assignment.

It has been held that where a National Bank gets a note as the successor of a State Bank—by assignment—that the remedy for usury paid is not under the Federal Statute but under that of the State.

Exeter National Bank vs. Orchard, 39 Neb., 485.

This is deemed sound and is the exact principle which defendants contend is applicable in this case. It being a case where the Bank is not a party to the contract, but claims its right *through* or by one who is a party to it.

By the Federal Statute, a National Bank is forbidden to loan money on real estate security. It is admitted by defendants as a matter of law that this inhibition will not invalidate a mortgage on lands given to such a Bank nor prevent its foreclosure. That the Federal Government alone may forfeit the charter of the Bank. It certainly will not be

questioned that it is the duty of the Bank to honestly observe this inhibition; that it is the duty of the courts to so construe the Statute that an honest observance will be compelled. Therefore, in addition to the plain legal phase of this case, equally plain it seems to defendants is it, that the Bank should be so held, that when the Government brings process to enforce the Statute the Bank cannot evade it by proving that it took no mortgage on land, and where the State as to that very mortgage, attempts to enforce its remedy for usury say that it is protected by a privilege given by the very Statute which it violated, and under which it claimed as against the Government it did not act. A construction of the Statute which would permit such double dealing is not to be seriously considered as proper in a Court of Justice.

There is a further consideration. Under the laws of Nebraska, applicable to the note and mortgage, Mattie N. Thrush, by signing the note to Sumner, is liable for a deficiency judgment. She did not borrow any money of the Bank, and signed no note to the Bank. She could never have sued the Bank on account of usury, yet by her rights as a party to the Sumner note she is entitled to the remedies against usury, to lessen the amount of her liability.

Then, again, the note given to the Bank by George Thrush to evidence the $5,000.00 as loan and on which the usury was paid to the Bank, is not sued on in this action. Upon that note the Bank can at any time sue George Thrush and recover a personal judgment, and to that note in regard to usury the Federal Statute applies; so that its privilege under the Federal Statute is available to it whenever it sees fit to sue upon its contract, and only when it sues upon that contract.

Defendants, therefore, respectfully submit to the Court that the decision of the Supreme Court of the State of

Nebraska holding the Federal Statute inapplicable as to usury to the foreclosure proceedings upon the note and mortgage from George and Mattie N. Thrush to Wm. H. Sumner is correct, and that there arises upon said note and mortgage no federal question.

Respectfully submitted,

GEORGE THRUSH,

MATTIE N. THRUSH,

By GEORGE H. THOMAS and

FRANK DOLEZAL, their Attorneys.

Supreme Court of the United States.

No. 50.—October Term, 1903.

The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, Plaintiffs in Error, vs. James Gadsden, George Thrush, Mattie Thrush, et al. } In error to the Supreme Court of the State of Nebraska.

[December 7, 1903.]

On August 8, 1890, George Thrush, one of the defendants in error, being indebted to the Schuyler National Bank, one of the plaintiffs in error, for money then and theretofore lent, executed a note to the bank for the sum of $5,000, payable six months after date. As collateral security for the payment of this note, Thrush and his wife executed a note and mortgage for $5,000 to one Sumner, who was at that time the president of the bank. The collateral note and mortgage were delivered to the bank and by it retained. The note made to the bank was renewed by the bank from time to time, and various payments of interest and on account of the principal were made to the bank, the principal sum thereby being reduced in March, 1894, to $3,000. In that month and year a new note was executed to the bank for the principal sum then due and interest, in all, $3,229. No money dealings were had at any time between either Thrush and his wife and Sumner individually.

James Gadsden, one of the defendants in error, sued Thrush and his wife in a Nebraska court to foreclose an asserted mortgage on real estate. Junior encumbrancers of record were made parties defendant, among them being Sumner, to whom the mortgage for $5,000, securing the collateral note previously referred to, had been executed. He answered, and by cross-petition asserted the lien of the mortgage, which he alleged was made to him as trustee, for the benefit of the Schuyler National Bank; he prayed foreclosure of such lien and the payment of the indebtedness to the bank, stated to be $3,229 and interest. The Schuyler National Bank was subsequently made a party defendant; and, by answer and cross-petition, claimed the benefit of the mortgage to Sumner, securing the indebtedness just stated, and joined in the prayer for foreclosure. Separate answers, similar in tenor, were filed on behalf of Thrush and his wife, in which were averred, in numerous paragraphs, many payments to the bank of usurious

interest during a period of five years, and in substance it was prayed that the amount of such payments might be deducted from the principal sum claimed by the bank to be due. In each of the answers was contained the following paragraph:

"That the said note of $5,000 of the defendants George Thrush and Mattie N. Thrush, together with the mortgage securing the same, were not executed and delivered to said William H. Sumner upon any consideration whatsoever, but the same are simply held by said defendant as collateral security to the amount owing by the defendant, George Thrush, on the said indebtedness now being evidenced by said $3,229 note, in this, that the said note of $5,000 and the mortgage securing the same were executed and delivered by this defendant and Mattie N. Thrush to said Sumner for the purpose that said Sumner might protect therewith said bank on account of the indebtedness of said George Thrush to said bank, and said note and mortgage were accepted by said Sumner with the knowledge and consent of said bank, and because said bank refused to take said mortgage and said Sumner in nowise protected said loan or advanced any money thereon and at the time of the maturity thereof, by virtue of the premises and the payments of usurious and illegal interest made thereon, as aforesaid, there was due and owing, after deducting the payments made upon the principal and the said payments of usurious interest, the small balance, to wit, of $252.20, and for the aforesaid balance the said defendant Sumner is entitled to a lien upon said premises under and by virtue of said mortgage and promissory note of $5,000."

A reply was filed to these answers. It was therein stated in substance that most of the alleged usurious interest had been paid to the bank more than two years before the commencement of the action, and that the remaining interest payments were not in excess of the rate allowed by law to be contracted for. The pleading concluded with the claim "that this court has no jurisdiction in this action to consider the question raised in said answer to each and every item of interest mentioned in said answer as paid to said Schuyler National Bank; that said items are not proper items of set-off or counter-claim and cannot be adjudicated except in a suit brought expressly for that purpose under the provisions of section 5198 of the Revised Statutes of the United States."

A decree was entered determining the priority of liens between the respective lienholders and providing for a foreclosure. Among other things it was adjudged that the mortgage to Sumner was executed and delivered for the benefit of the bank, and that the bank was entitled to the proceeds of the note and mortgage. As to the defense of usury set up in the answers it was decided that, as the transaction was one with a national bank, it was governed by the laws of the United States, and, therefore, recovery by way of set-off of the usurious interest alleged to have been paid was refused. Recovery of the interest embraced in the claim of the bank was, however, denied, and judgment was entered only for the principal sum found to be due and owing to the bank.

On appeal, the Supreme Court of Nebraska reversed the judgment of the District Court in the particular just noticed, and remanded the cause with directions "to ascertain the amount of money advanced to Thrush by the Schuyler National Bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any." (56 Neb. 565.) On a rehearing, the appellate court reaffirmed its previous decision. (58 Neb. 340.) Thereupon a writ of error was allowed from this court, which was subsequently dismissed for want of jurisdiction. (179 U. S. 384.) Subsequently the State District Court entered a judgment in conformity with the mandate of the Supreme Court of Nebraska, and such judgment was affirmed on appeal. (63 Neb. 881.) The present writ of error was thereupon allowed.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The question for decision is, Did the Supreme Court of Nebraska rightly decide that the controversy concerning usurious interest paid was to be governed by the statutes of Nebraska on that subject and not by the laws of the United States on the same subject, as expressed in section 5198 of the Revised Statutes? We say this is the sole question, because it is undoubted that if the rights of the parties are to be determined by the laws of the United States, the ruling below was wrong. This results from the prior adjudications of this court holding that where usurious interest has been paid to a national bank, the remedy afforded by section 5198 of the Revised Statutes is exclusive, and is confined to an independent action to recover such usurious payments. (*Haseltine* v. *Central National Bank*, 183 U. S. 132, and cases cited.) If, on the other hand, the controversy is governed by the local law of Nebraska, then the construction and application of that law made by the court of last resort of the State is binding.

In fact, this is not controverted and could not be, since the Supreme Court of Nebraska conceded that if the contention as to usurious interest ought to be determined by the laws of the United States, the conclusion which the court reached was erroneous. That court, however, held that the rights of the parties were to be measured by the law of the State instead of the law of the United States, because the collateral mortgage was not made, *eo nomine*, to the bank, but to an individual. This view was deemed to be fortified by the suggestion that, as the collateral note was secured by mortgage on real estate, it could not under the laws of the United States have been lawfully made in favor of a national bank. The collateral note and mortgage, it was, therefore, intimated must be assumed to have been executed to an individual to avoid the effect of the laws of the United States and the consequent knowledge which would have been con-

veyed to the proper officers of the United States that the bank was violating the law.

The reasoning by which the judgment of the Supreme Court of Nebraska was controlled is, in our opinion, erroneous. The court did not hold that, because the collateral mortgage was taken in the name of an individual, it could not be enforced by the bank under the law of Nebraska, but simply held that, although it was enforceable by the bank, the remedy as to the usurious interest was governed exclusively by the State law, upon the theory that the transaction was not with the bank. But the usurious interest had all been paid, not to the individual upon the collateral note, but to the bank upon the principal obligation held by it. It was this interest so paid to the bank on the principal note held by it which was in effect imputed so as to fix the amount due. The result of this was to treat the transaction as an individual one in order thereby to exclude the law of the United States, and then at once to treat it as a bank transaction for the purpose of ascertaining and imputing the sums of usurious interest which had been paid. This was to administer the rights of the parties upon distinct and wholly inconsistent theories. Either it was an individual transaction or it was not. It could not in reason have been at one and the same time both the transaction of the bank excluding the individual and a dealing between individuals excluding the bank. As the usurious interest for which a remedy was afforded had been paid to the bank, in dealings by the bank with its debtor, and as the necessary effect of the judgment below was to reduce the debt due to the bank by allowing the imputation of the sum of the usurious interest, we are of opinion that the controversy was governed by the laws of the United States and not by the law of the State of Nebraska.

Nor do we think the suggestions made in the opinion of the court below respecting the power of a national bank under the laws of the United States to accept real estate security operate in any way to modify the conclusion we have just expressed. It is not contended that under the law of Nebraska an agent, acting in his own name, may not take security for the benefit of a principal, or that there is or could be any valid statute of the State of Nebraska discriminating against national banks, and depriving them of the benefit of transactions so consummated. This being true, it follows that the taking of real estate security by the president of the bank in his individual name, for the benefit of the bank, was in legal effect but the taking of security by the bank itself. Now it is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank for a debt coincidently contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subjects the bank to be called to account by the government

for exceeding its powers. In *Logan County* v. *Townsend*, (139 U. S. 67,) the rule on this subject, as settled by the previous authorities, was thus stated by the court, speaking through Mr. Justice Harlan (p. 76):

"In *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, it appeared that a national bank loaned money upon the security of a note and a deed of trust of lands, both of which were assigned to it. The statute declared that a national banking association could loan money 'on personal security,' and could purchase, hold and convey real estate for certain named purposes, 'and for no others,' among which was not included the securing of a present loan of money by a deed of trust or mortgage on real property. The court, while assuming that the statute, by clear implication, forbids the bank from making a loan on real estate, refused to restrain the bank from enforcing the deed of trust. The decision went upon these grounds: That the bank parted with its money in good faith; that the question as to the violation of its charter, by taking title to real estate for purposes unauthorized by law, could be raised only by the government in a direct proceeding for that purpose; and that it was not open to the plaintiff in that suit, who had contracted with the bank, to raise any such question in order to defeat the collection of the amount loaned. If any doubt existed as to the scope of the decision in that case, it was removed by *National Bank of Genesee* v. *Whitney*, 103 U. S. 99, where it was held that the right of a national bank to enforce a mortgage of real estate taken by it to secure indebtedness then existing, as well as future advances, could not be questioned by the debtor, and that a disregard by the bank of the provisions of the act of Congress upon that subject only laid the association open to proceedings by the government for exercising powers not conferred by law."

It follows from the foregoing reasons that the Supreme Court of Nebraska erroneously determined the rights of the parties by the rule of the State law, when it should have applied the law of the United States.

The judgment of the Supreme Court of Nebraska is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 50.—October Term, 1903.

The Schuyler National Bank of Schuyler, Nebraska, and William H. Sumner, Plaintiffs in Error, *vs.* James Gadsden, George Thrush, Mattie Thrush, et al.	In error to the Supreme Court of the State of Nebraska.

[December 7, 1903.]

Mr. Justice Brown, with whom was Mr. Justice Brewer, dissenting.

I am constrained to dissent from the opinion of the court in this case.

The facts, concisely stated, are as follows: George Thrush executed a note to the bank for $5,000, payable in six months. At the same time Thrush and wife executed a collateral note and mortgage for the same amount to Sumner, president of the bank. This note and mortgage, given partly for an antecedent and partly for a contemporaneous debt, were delivered to the bank and retained by it.

The note made to the bank was renewed from time to time, and various payments of interest and principal were made, and the principal sum thereby reduced, in March, 1894, to $3,000. At that time a new note was executed to the bank for the principal sum due and interest, namely, $3,229. No dealings were had at any time between Thrush and wife and Sumner individually.

Suit having been begun by Gadsden to foreclose a prior mortgage, and Sumner having been made a party as junior encumbrancer, he answered, and by cross petition asserted the lien of the mortgage, which he alleged was made to him as trustee of the bank. The bank being also made defendant, filed an answer and cross petition, claiming the benefit of the mortgage to Sumner.

It is clear that there was but one actual debt. The question is, whether, in asserting its right to foreclose the mortgage made to Sumner individually, it must not submit itself to the laws of the State affecting usury; in other words, whether, in the foreclosure of a mortgage created under the laws of a State and executed by one citizen of a State to another, its obligations are to be determined by State law or Federal law. Congress forbids such a mortgage; the State permits it. There can be no doubt that the bank caused the mortgage to be given to Sumner on account of the law forbidding national banks from receiving security by way of mortgage upon

real estate, and to obviate any difficulties which might be interposed either by the mortgagor or by the government, by taking the mortgage in the name of the bank.

Had the mortgage expressed upon its face the exact truth, namely, that it was given for the benefit of a national bank, and partly, at least, for the security of a contemporaneous debt, it would have fallen within the ban of the Federal statute. It is true the State law permitted it, but accompanied it with a forfeiture of the entire interest if usury were taken. The question is whether, in enforcing this mortgage, which the bank was prohibited from taking in its own name, it may claim an exemption from the usury laws of the State. So long as the dealings were solely between the bank and Thrush, and payments were made upon the bank note in question, the transaction with regard to usury was governed by the Federal law. But in case the bank elected to foreclose the mortgage, I think it took the benefit of it *com onere*. He who seeks equity must do equity. It could not take the benefit of the mortgage to Sumner, and claim a right to foreclose for the amount due without at the same time admitting that the payments which had been made were made upon a debt secured by the mortgage, and subject to the disability of the State law. As was justly said by the Supreme Court of Nebraska: "It would be highly unconscionable to permit a person to give a contract a false form to evade the burdens which would follow from its true expression, and then permit him to show the truth as against the form to evade the burdens caused by a contract in the form which has been so chosen." The bank ought not to be permitted to blow hot and cold in the same transaction. If it claimed the benefit of a mortgage made to an individual, it should take it with such burdens as would rest upon it if the transaction had originally been what it was represented to be upon its face. The opinion of the court suggests an easy method by which the prohibition of the Federal statute against the lending of money upon real estate security may be successfully evaded without the slightest danger to the bank.

True copy.

Test:

Clerk Supreme Court, U. S.